Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

Dr. Sami Amin Al-Arian,

Petitioner,

v.

United States of America,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Whether the Sixth Amendment right to a jury verdict on facts to be used in sentencing, established in the Apprendi, Ring, Blakely, Booker and Cunningham cases decided by this Court, is violated when the sentencing court relies on "acquitted conduct" rejected by the jury, in apparent violation of Jones v. United States.

II. Whether, after this Court's rulings in Jones v. United States, United States v. Booker and Cunningham v. California, the sentencing court's use of "acquitted conduct" to reject the Government's recommended sentence, pursuant to a bargained-for plea to a lesser offense, was "reasonable" on the facts of this case.

III. Whether a defendant who has entered a guilty plea waives the right to appeal the use of "acquitted conduct" by the sentencing court, although the magistrate's colloquy Rule 11 reflects the *specific* instruction that: (a) the eventual sentence will not be based upon "acquitted conduct", and (b) the right to challenge the constitutionality of the sentence is not waived by the plea.

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Jurisdictional Grounds

Judgment was rendered in the United States Court of Appeals for the Eleventh Circuit on October 5, 2006. Petitioner's Motion for Reconsideration was denied on December 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Constitutional Provisions Involved

A. Federal Constitutional Provisions

The Fifth Amendment to the United States Constitution provides in relevant part: "...[No person shall] be deprived of life, liberty, or property, without due process of law..."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury ...."

Factual Background and Statement of the Case

I. Proceedings Below:

On December 6, 2005, following a six-month trial, Dr. Sami al Arian was found not guilty by a jury of most of the serious, violence-related terrorism counts with which he had been charged. At trial, the defense presented no evidence or testimony and relied entirely upon the First Amendment rights of Freedom of Speech and Association, in arguing to the jury. Of the 17 counts at issue, Dr. al Arian was acquitted of the following eight counts:

Count Two, Conspiracy to Murder or Maim Persons at Places Outside the United States, in violation of 18 U.S.C. § 956(a)(1);

Count Eight, Use of the Mail or Any Facility in Interstate or Foreign Commerce, in violation of 18 U.S.C. § 1952(a)(2) and (3) and 18 U.S.C. § 2;

Count Seventeen, Use of the Mail or Any Facility in Interstate or Foreign Commerce, in violation of 18 U.S.C. § 1952(a)(2) and (3) and 18 U.S.C. § 2;

Count Twenty-Seven, Providing Material Support to a Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B(a)(1) and 18 U.S.C. § 2;

Count Twenty-Eight, Providing Material Support to a Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B(a)(1) and 18 U.S.C. § 2;

Count Twenty-Nine, Providing Material Support to a Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B(a)(1) and 18 U.S.C. § 2;

Count Forty-Six, Obstruction of Justice, in violation of; 18 U.S.C. § 1505;

Count Fifty-Three, Obstruction of Justice, in violation of 18 U.S.C. § 1503 and 18 U.S.C. §2.

The jury could not reach a verdict on the remaining charges.[1]

Following the trial, and to prevent a retrial on the "hung-jury" counts, the parties agreed to a guilty plea to Count Four: "conspiracy…to provide services" to individuals with whom the Secretary of State has forbidden association (in this case, members of the Palestinian Islamic Jihad). The two acts in furtherance of this "conspiracy" were: (a) failing to be forthcoming regarding Dr. al Arian's knowledge of the

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[1] Post-verdict news reports suggested that the jury "hung" 10-2 for acquittal on the remaining counts. The jury could not reach a verdict on the following Counts:

Count One, Conspiracy to Conduct or to Participate in the Conduct of an Enterprise through a Pattern of Racketeering Activity, in violation of 18 U.S.C. § 1962(d);

Count Three, Conspiracy to Provide Material Support to a Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B;

Count Four, Conspiracy to Make and Receive Contributions of Funds, Goods, or Services to, or for the Benefit of Specially Designated Terrorists, in violation of 18 U.S.C. § 371;

Count Seven, Use of the Mail or Any Facility in Interstate or Foreign Commerce, in violation of 18 U.S.C. § 1952(a)(2) and (3) and 18 U.S.C. § 2;

Count Nine, Use of the Mail or Any Facility in Interstate or Foreign Commerce, in violation of 18 U.S.C. § 1952(a)(2) and (3) and 18 U.S.C. § 2;

Count Thirty-Eight, Money Laundering, in violation of 18 U.S.C. § 1956(a)(2)(A);

Count Thirty-Nine, Money Laundering, in violation of 18 U.S.C. § 1956(a)(2)(A);

Count Forty, Money Laundering, in violation of 18 U.S.C. § 1956(a)(2)(A);

Count Forty-Four, Attempt to Procure Citizenship or Naturalization Unlawfully, in violation of 18 U.S.C. § 1425(a).

political associations of a colleague (itself, not a crime); and, (b) assisting Dr. al Arian's brother-in-law in his campaign against the use of "secret evidence" in deportation proceedings (also, in itself, not a crime). However, both the written plea agreement, and the colloquy at sentencing made clear that Dr. al Arian was not pleading guilty to any acts of violence, nor of providing any direct support to the organization in question.

The Justice Department agreed that in exchange for the guilty plea: (a) Dr. al Arian would be released within weeks of May 1, 2006; (b) the Justice Department would assist in Dr. al Arian's immediate voluntary departure from the United States;[2] (c) the usual "cooperation clause" in the standard plea agreement would be struck from the written document, as part of the bargain; (d) the plea agreement would not include any admissions of violent conduct.

The parties agreed on a Level 23 sentencing guideline, departing downward 3 levels for Defendant's acceptance of responsibility, which would result in a sentence of 46-57 months under the Guidelines. The Justice Department promised to recommend a sentence at the bottom of the Guidelines, which would have resulted in Dr. al Arian's release for deportation shortly after May 1, 2006. (Appendices 1, 2 and 4).

In the April 14, 2006 Rule 11 plea colloquy (Appendix 2, pp. 13-45), Magistrate Judge Thomas McCoun specifically informed Dr. al Arian that he need not be concerned that the sentencing court would consider "acquitted conduct" and that, in entering the plea, he was not waiving the right to appeal "unlawful or constitutional" matters relating to the imposition of the sentence. With this understanding on the record, Judge McCoun found the plea to be knowing and voluntary.

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[2] The Order for Immediate Deportation was signed by Judge Moody on May 1, 2006.

However, on May 1, 2006 the sentencing court accepted all aspects of the Justice Department's recommendations in the plea agreement, except the recommendation for a sentence "at the bottom of the guidelines" that would result in Dr. al Arian's almost immediate release. (Appendix 4).

Rather, the sentencing court read into the record a lengthy statement in which the court cited several of the acquitted counts as the basis for extending Dr. al Arian's sentence by nearly a year beyond that recommended by the Justice Department and imposed the lengthiest sentence possible without explicitly violating this Court's opinion in United States v. Booker.

Petitioner filed a timely Notice of Appeal and Brief, to which the Justice Department responded with a Motion to Dismiss alleging "waiver," despite the April 14, 2006 record of Magistrate Judge McCoun's explicit reservation of particular appeal rights. The Eleventh Circuit Court of Appeals dismissed the appeal on Oct. 5, 2006, on "waiver" grounds before allowing the parties to fully brief the issue of "acquitted conduct," which had recently been discussed in the dissent from a panel opinion in that circuit.[3]

A three-member panel held that the plea waiver contained by Defendant's plea agreement precluded Defendant's appeal. Defendant filed a Motion to Vacate the Order (viewed as a Motion for Reconsideration by the Court), which was rejected in an order entered on Dec. 6, 2006. (Appendix 12).

II. Factual Background

The plea agreement specifically excluded commission of, or involvement in, any violent acts by Petitioner. These are memorialized in the written plea agreement (Appendix 1)

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[3] United States v. Faust, 456 F.3d 1342 (11th Cir. 2006), (Barkett, J. dissenting).

and the oral statements of the Justice Department, at the April 14, 2006 Rule 11 Hearing (Appendix 2) and the May 1, 2006 sentencing hearing. (Appendix 4).

The transcript of the April 14, 2006 Rule 11 colloquy before Magistrate Judge McCoun (Appendix 2) reveals that in response to defense counsel's question regarding possible use of "acquitted conduct" by the sentencing court, Judge McCoun replied:

> THE COURT: I don't think you have to worry about Judge Moody holding any matters *for which you were acquitted* against you at all....*I don't think on any counts you've been acquitted of you can – you should worry about the judge holding it against you...*

(Appendix 2, pp. 31-32). Despite Judge McCoun's assurance, the sentencing court explained its rejection of the prosecutor's recommended sentence by specifically referring to violent conduct, which was rejected by the jury verdict, as well as facts that had not been decided by the jury.

The sentence imposed by the Court was at the top of the guidelines for a non-violent first offense, and was contrary to the fully informed and negotiated recommendation of the Justice Department. Other than "acquitted conduct," The sentencing court did not specify which factors under 18 U.S.C. § 3553(a) the court considered in rejecting the government's recommended sentence.

The sentencing court repeatedly referred to, and implicated Appellant in, alleged acts of violence and provision of funds for acts of violence, of which the defendant had been acquitted. (See Counts Two, Twenty-seven, Twenty-Eight, and Twenty-nine.) The sentencing court described one specific incident in detail and then castigated Appellant, saying:

> "On January 22nd, 1995, in Beit Lid, there was

> a double-suicide bombing claimed by PIJ…including women and children"
>
> "[a]nyone with even the slightest bit of human compassion would be sickened. Not you. You saw it as an opportunity to solicit more money to carry out more bombings."
>
> "…your only connection to widows and orphans…is that you create them…"
>
> "The evidence is clear that you were a leader of Palestinian Islamic Jihad…when it comes to blowing up women and children on buses…you laughed when you heard about the bombings…you even pleaded for more donations to pay for more operations…"
>
> "I find it interesting that here in public, in front of everyone you praise this country, the same country that in private you called the 'Great Satan'."

(Transcript of Sentencing Hearing, p. 16, Appellant's Appendix 4, pp. 60-61). Of course, these assertions are completely contrary to the jury verdict and completely unsupported by the facts to which both parties specifically stipulated in the plea agreement.

In addition, on April 14, Magistrate Judge McCoun had also made clear that the plea did *not* include waiver of the right to appeal "unlawful or unconstitutional" conduct by the trial court or the prosecutor. Judge McCoun stated:

> …And the *third* way you could take an appeal would be **if something about the sentencing violated the Constitution…**
>
> The effect of this is that…you are not going to

> able to appeal [the sentence], **as long as it is lawful and constitutional**..."

April 14, Change of Plea Hearing (Appendix 2, pp. 31-33).

Despite this apparently clear explication of the appellate rights that were waived, and those that were not, the Court of Appeals held that Dr. al Arian had waived his right to appeal the constitutionality of his "acquitted conduct" sentence under Booker, or other constitutional provisions. Dr. al Arian remains indefinitely detained, as a result of the sentence imposed by the sentencing court.[4]

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[4] Although the Justice Department originally agreed that it was in the best interest of the Department of Justice, the United States, and justice that Dr. al Arian be released and deported during the month of May 2006, the extended sentence imposed by Judge Moody has had secondary consequences. On October 18, 2006, despite the clear understanding that Dr. al Arian would leave the country shortly after the May 1 sentencing hearing, and an agreement of "no cooperation" as part of the plea, an Assistant U.S. Attorney subpoenaed Dr. al Arian to testify before a Grand Jury in the Eastern District of Virginia.

Because Dr. al Arian believes deeply that the action by the Justice Department violates the agreements upon which the guilty plea was induced, he has refused to testify. He has also noted that this same AUSA has indicted another acquitted witness who did testify before another grand jury, for allegedly lying under oath.

As a result of the failure of the Justice Department to abide by its original agreement, Dr. al Arian has been on a hunger-strike since January 22, 2006, when he was held in contempt for failing to testify and is now housed at a Federal Hospital facility in Butler, North Carolina, as his health deteriorates. The contempt issues are being litigated in a separate context, but the running of his "acquitted conduct" sentence is tolled during the contempt proceedings and the possibility of indictment for failure to testify cannot be ruled out.

REASONS FOR GRANTING THE WRIT

I. This Court should accept *certiorari* to resolve a serious, ongoing conflict within the Circuits regarding the impact of United States v. Watts on the Sixth Amendment right to a jury verdict on facts to be used in sentencing, established in the Apprendi, Ring, Blakely, Booker and Cunningham cases decided by this Court, when the sentencing court relies on "acquitted conduct" rejected by the jury, in apparent violation of Jones v. United States.

Following this Court's Sixth Amendment opinions in United States v. Booker, 543 U.S. 220 (2005) and Cunningham v. California, 127 S.Ct. 856, No. 05-6551, 2007 WL 135687 (January 22, 2007) the lower federal judiciary has expressed widely differing views regarding the impact of the double jeopardy-based opinion in United States v. Watts, 519 U.S. 148 (1997), on the primacy of jury verdicts, when "acquitted conduct" is used in sentencing. Insofar as the lower court opinions permit a sentencing court to consider factual elements of the offense of which the accused has been acquitted to extend a sentence, these cases appear to directly contradict this Court's opinion in Jones v. United States, 526 U.S. 227 (1999).

A. Divisions within the Circuits Regarding the Use of "Acquitted Conduct" in Sentencing, after Booker and Cunningham, Require that the Issue be Addressed by this Court.

Although the Booker Sixth Amendment analysis does not specifically address "acquitted conduct," presumably the use of "acquitted conduct" to impose a sentence in excess of the statutory maximum would be prohibited by its reasoning. However, whether "acquitted conduct" may properly be used by the sentencing court remains the source of great conflict within the circuits.

In at least three circuits which have decided the "acquitted conduct" issue, both before and after Cunningham v. California was decided, strongly worded dissents or concurring opinions have taken issue with the proposition that the double-jeopardy analysis of Watts should be read to permit the use of "acquitted conduct" in sentencing. These dissenting opinions have read the Sixth Amendment principles that this Court has recently established in the Apprendi-Blakely-Booker-Cunningham line of cases, as prohibiting judicial use of "acquitted conduct" for any valid purpose in sentencing. *See*, United States v. Faust, 456 F.3d 1342, 1349 (11th Cir. 2006), (Barkett, J. dissenting); United States v. Mercado, 474 F.3d, 654, 658 (9th Cir. (Cal.))(Fletcher, J. dissenting); United States v. Grier, ____. F3d. ____ 2007 WL 31502 (3rd Cir. 2007) (Ambrose, J. concurring in the judgment), (Soviter, J. and McKee, J. dissenting).

The Sixth Amendment implications of Booker, as it relates to "acquitted conduct," were first discussed in United States v. Pimental, 367 F.Supp.2d 143 (D. Mass. 2005).[5] which called into question judicial use of "acquitted conduct" in sentencing. *See also*, United States v. Ibanaga, 454 F.Supp.2d 532, 536-38 (E.D. Va. 2006); United States v Coleman, 370 F. Supp 2d. 661, 668-73 (S.D. Ohio 2005); United States v. Gray, 362 F.Supp.2d 714, 721-22 (S.D. W.Va. 2005); United States v. Carbahal, No. 04 222AKH, 2005 WL 476125, at *5 (S.D. NY. Feb. 22, 2005). Also, a trial court opinion which excluded "acquitted conduct" on Sixth Amendment grounds was overruled by the Fourth Circuit in United States v. Ashworth, 139 Fed. Appx. 525 (4th Cir. 2005)(unpublished).

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[5] *See* Judge Nancy J. Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 Suffolk U. L. Rev. 419 (1999) (discussing Sixth Amendment issues implicit in the use of "acquitted conduct").

However, even *within* the opinions upholding the use of "acquitted conduct," based on the double-jeopardy analysis of Watts, the courts have been far from uniform in its application. For example, in United States v. Horne, 474 F.3d 1004 (7th Cir. 2007), Judge Posner is careful to distinguish the facts in that case from,

> "...a case in which a jury convicts a defendant of one very minor crime and acquits him of the serious crimes with which he was charged, and the judge then bases the sentence almost entirely on those crimes." Horne at 1004.

Judge Posner's opinion apparently recognizes that, in some circumstances, "acquitted conduct" could *not* be used by the sentencing court. Since Jones clearly prohibits the use of "acquitted conduct" in sentencing when that conduct is an element of the *offense*, it is plain that the relationship between Watts, Booker and Jones continues to plague even the opinions which have relied upon Watts to uphold judicial use of "acquitted conduct" in sentencing.[6]

B. The Watts *Per Curiam* Opinion, Which was Not Briefed or Argued, and From Which Two Justices Dissented, Provides an Insufficient Foundation for Rejecting the Booker/Jones/Cunningam Sixth Amendment/Due Process Analysis, with Respect to the Use of "Acquitted Conduct" in Sentencing.

Because the Watts opinion was based on an incomplete record, Justices Stevens and Kennedy dissented precisely *because* the reach of the *per curiam* opinion (beyond the limited double-jeopardy issues upon which the

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[6] *See also*, United States v. Lynch, 437 F.3d 902, 916 (9th Cir. 2005) (applying a "clear and convincing evidence" test to use of an unproven sentencing factor that disproportionately impacts the sentence, rather than the preponderance standard applied in Watts.)

case was decided) was not clear. The procedural posture of United States v. Watts, and its reliance on Double Jeopardy, rather than the Sixth Amendment principles, makes the case a precarious foundation upon which to negate the fundamental Sixth Amendment principle of jury supremacy in fact-finding.

According to Justice Stevens in Booker, "[Watts involved]...a very narrow question regarding the interaction of the Guidelines and the Double Jeopardy Clause." And, that the Watts opinion "did not even have the benefit of full briefing or oral argument." As a result, "it was unsurprising that [the Court] failed to consider fully the issues presented to us in these cases." Booker at 240, n.4. However, this does not mean that the Sixth Amendment analysis of Booker and Jones v. United States, which would prevent the use of "acquitted conduct," are resolved by reference to the Double-Jeopardy/Fifth Amendment analysis of Watts, as some of the lower courts seem to have concluded.

It is also important to note that, other than United States v. Grier, 2007 WL 31502 (3rd Cir. (Pa)) (*See* discussion, *infra*) the circuits' opinions which have upheld the use of "acquitted conduct" by relying on Watts have failed to note that this Court has already held that a distinction must be made for "acquitted conduct" that is a factual element of the *acquitted offense*, as apparently required by this Court in Jones v. United States.[7]

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[7] Despite Justice Steven's explicit recognition that Double Jeopardy analysis in Watts as NOT necessarily determinative of the Sixth Amendment issues in Booker, majority opinions in several of the Circuits have relied in Watts in upholding the exercise of judicial discretion in sentencing based on "acquitted conduct" and none have referred to the relevant discussion in this Court's holding in Jones. *See*, United States v. Gobbi, 471 F.3d 302 (1st Cir. 2006); United States v. High Elk, 442 F.3d 622 (8th Cir. 2006); United States v. Dorcely, 454 F.3d 366 (D.C. Cir. 2006); United States. v. Price, 418 F.3d (7th Cir. 2005); United States v. Magallanz, 408 F.3d 672 (10th Cir 2005); United States v. Duncan, 400 F.3d 1297(11th Cir. 2005); United States v. Ashworth, 139 Fed. Appx. 525 (4th Cir. 2005)(unpublished); United States v. Vaughn, 430 F.3d 518

Whether this is the result of oversight, or an understandable, inherent desire on the part of the federal judiciary to retain its maximum prerogatives following Booker, the result is the same and actually reinforces the importance of the role of the jury in sentencing as a *bulwark against judicial fiat*, upon which the Sixth Amendment, Jones and Booker are premised,[8] as well as the Due Process requirement of *proof beyond a reasonable doubt* of the elements of the offense, first articulated in In re Winship.[9]

C. The Use of "Acquitted Conduct" by the Sentencing Court, Contrary to the Verdict of the Jury, Apparently Violates Jones v. United States, Insofar as *Elements of the "Acquitted Offense"* are Used to Justify an Enhanced Sentence.

In Jones v. United States, 526 U.S. 227 (1999), an opinion written by Justice Souter in which Justices Stevens, Scalia, Thomas and Ginsburg joined, this Court held that "acquitted conduct" may *not* be used in sentencing, at least with respect to elements of the offense, under the Sixth Amendment. Elements of the offense that were, or should have been, charged in the indictment may *never* be considered by the sentencing court following a jury acquittal. Jones, like Booker, is rooted in the fundamental importance of jury fact-finding upon which the Sixth Amendment is premised:

> This question might be less serious...if the history bearing on the framer's understanding

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(2nd Cir. 2005) (upholding the use of acquitted conduct, *other* than that constituting elements of the offense).

[8] *See also* Blakely v. Washington, 542 U.S. 296, 307 (2004) ("The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.").

[9] 397 U.S. at 361-64 cited in Grier at *52 (McKee, J dissenting).

> of the Sixth Amendment principle demonstrated an accepted tolerance for exclusively judicial fact finding to peg penalty limits. *But such is not the history.*"

Jones at 244 (emphasis added).

Although the majority in Grier dismissed Jones by characterizing the opinion as one of statutory construction, alone the dissent makes clear that:

> That [non-constitutional] reading of *Jones* is belied by the rationale for the opinion itself which discussed at length the "grave and doubtful constitutional questions...that would arise were it to interpret the statute to treat the finding of 'serious bodily harm' as a sentencing factor...rather than as an element of the offense that must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."

Grier at *29, *citing* Jones at 232 (internal quotes and citations omitted).

It appears that the Second Circuit is alone in the post-Booker cases in explicitly distinguishing "between elements of an offense and facts relevant to sentencing," when the sentencing court relies upon "acquitted conduct". *See* Vaughn, 430 F.3d at 526.

Whether the Jones distinction prohibiting consideration of "acquitted conduct" that is related to an element of the charged and acquitted offense provides a resolution to the Watts/Booker contradiction must eventually be answered and is yet another reason that this Court should accept *certiorari* to dispel a looming post-Booker/Jones-Watts dilemma.

D. Whether "Acquitted Conduct" May Ever be "Reasonably" Considered under Booker Will Necessarily be Implicated by this Court's Decision in Claiborne v. United States and United States v. Rita, which are Currently Pending Before the Court.

Two cases argued before this Court on February 20, 2007 question whether sentences within the Sentencing Guidelines may be presumed "reasonable" in due process terms under the Booker analysis. *See*, Claiborne v. United States, 439 F.3d 479 (8th Cir. 2006), *cert.* granted, 75 U.S.L.W. 3243 (U.S. Nov. 3, 2006)(No. 06-5618) and Rita v. United States, 177 Fed. Appx. 537, 2006 WL 1144508 (4th Cir. 2006, *cert.* granted 75 U.S.L.W. 3243 (U.S. Nov. 3, 2006)(No. 06-5754). No matter how the Court resolves these issues, the proper use to which "acquitted conduct" may be put by the sentencing court, within the statutory maximum and/or the Sentencing Guidelines, will remain unanswered because of the apparent on-going contradiction between Watts, Booker and Jones.

Even if one were to assume that this Court were to rule that a within the Guidelines sentence IS presumptively reasonable, the question still remains as to whether: (a) the presumption may be overcome when a judge relies on "acquitted conduct" in increasing a within-the-Guidelines sentence, and (b) "acquitted conduct" may *ever* be reasonably relied upon by a sentencing judge after Booker, Cunningham and Jones and, if so, under what circumstances.

E. The Procedural Posture of this Case Presents an Excellent Opportunity to Clarify the Apparent Contradiction Between Watts, Booker and Jones with Respect to the Proper Role of "Acquitted Conduct" in Judicial Sentencing.

The limited and uncontested facts of this case[10] present a pristine tablet upon which this court may clearly write, in establishing the proper use of "acquitted conduct" in sentencing:

First, because Petitioner was acquitted of *all* counts involving violence or direct support for violence at trial, and the jury hung 10-2 for acquittal on the remaining counts, it is plain that there has been *no* jury finding of facts "beyond a reasonable doubt" as required by Booker, Cunningham and Jones.

Second, the Petitioner entered a guilty plea to a much less serious crime than any of which he was acquitted or accused and the Government specifically agreed that there was no implication of violence committed by the Petitioner within the plea agreement, itself.

Third, the trial court clearly based its exercise of discretion to increase the sentence, beyond that recommended by the Government, *exclusively* on the acts of violence of which the Petitioner had been acquitted by the jury.

F. Conclusion

Unless, and until, this Court harmonizes the apparent contradictions between Watts, Booker and Jones, regarding the proper use of "acquitted conduct" within the statutory maximum and/or the Sentencing Guidelines, literally thousands of sentences being imposed daily in the lower federal courts will be subject to post-Booker challenge. Clarity and judicial efficiency, as well as resolution of a critically important Sixth Amendment issue, require granting a Petition for *Certiorari* on the issue of "acquitted conduct" in the very near future.

Moreover, it is now obvious that significant differences in interpreting the apparent Watts/Booker

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[10] The entire factual record relevant to the "acquitted conduct" issue is included in the 149 page Appendix attached.

contradiction, in light of Jones Sixth Amendment analysis, is creating serious divisions of opinion within the Circuits. Even after this Court's Cunningham opinion, and the anticipated opinion in Claiborne/Rita, it is necessary for the Court to reconcile this apparent contradiction sooner rather than later. It seems that there are, or will soon be, cases from four different Circuits presenting the "acquitted conduct" issue to this Court.

This case presents the Court with a near-perfect set of facts upon which to decide this issue in a way that will establish standards for the use of acquitted conduct in the many cases where the facts are not as clearly demonstrative of the Sixth Amendment problem presented by "acquitted conduct" as those in this case. The Watts/Booker/Jones conundrum should not be permitted to go unresolved.

II. This Court should accept *certiorari* because, after this Court's rulings in Jones v. United States, United States v. Booker and Cunningham v. California, the sentencing court's use of "acquitted conduct" to reject the Government's recommended sentence, pursuant to a bargained-for plea to a lesser offense, was not reasonable on the facts of this case.

It is not reasonable, under Booker, for the sentencing court to rely on "acquitted conduct" to reject a Government-recommended sentence, pursuant to a fully negotiated guilty-plea agreement. This is not to say that the sentencing court must accept *every* plea agreement, but simply that it is not *reasonable* for the sentencing court to reject a Justice Department recommendation in a fully negotiated plea agreement, by relying on factual elements of the offense that the jury has rejected, as apparently prohibited by this Court's reasoning in Jones.

Even under the Booker "reasonableness" standard, as discussed in United States v. Horne, 474 F.3d 1004 (2006), Judge Posner recognized that "acquitted conduct" could not

fairly be used when a jury has convicted a defendant of a lesser offense, and the sentence is based upon the most *serious* crimes of which the defendant was acquitted. Id. In this case, the defendant was not found guilty of any offenses. Nevertheless, the sentencing court relied on the *most serious* charges of which he was acquitted in rejecting a bargained-for Government recommended sentence.

Although a similar post-plea sentencing issue *has* been upheld *post*-Cunningham, following a guilty plea to a lesser offense in United States v. Grier, the defendant in that case had not been acquitted by the jury of the specific facts used to justify extending the sentence and the petitioner had failed to raise the Booker/Jones Sixth Amendment issue. Grier at *15 and *22 n.34 (Ambro, J. concurring). Thus, both the majority and concurring opinions discussed the implications of Jones, only in response to the dissent questioning the continuing validity of Watts, when judicial sentencing arises from factual *elements of an offense* which have been rejected by the jury. Grier at *24.

Unlike Grier, in the case at bar, the jury *did* acquit the Petitioner of all charges relating to the commission of violent acts after a six-month trial. Despite the fact that Petitioner did not offer evidence and did not testify, the trial court read a prepared statement into the record in which the court found: (a) that Petitioner had prevaricated although he had not testified; (b) that Petitioner was guilty of making inculpatory statements that, in fact, had been allegedly uttered by another similarly acquitted co-defendant; and, (c) that Petitioner was "guilty" of numerous acts of violence, of which the jury verdict had specifically acquitted the Petitioner (Appendix 4, pp.60-61).

It is difficult to imagine a clearer case for the need for protection against judicial *hubris*, which the Sixth Amendment jury verdict requirement in Booker and Jones, and the Due Process requirement of proof beyond a reasonable doubt in In re Winship, 397 U.S. 358 (1970), were

intended to protect.

Also, unlike the defendant in Grier, Petitioner pled guilty to a lesser, non-violent offense that included a meticulously negotiated and worded plea agreement that included not only Petitioner's almost immediate release for the equivalent of time served in May 2006, but also his *immediate* voluntary departure from the United States, evidenced by the trial court's entering of a deportation order on the date of sentencing. (Appendix 6). Thus, ironically, the court's use of "acquitted conduct" to *extend* Petitioner's sentence beyond that recommended and bargained-for by the Government, actually frustrated the stated objectives of the Government in reaching that agreement in the first place...one of which was the immediate departure of Petitioner from the United States.

Should the use of "acquitted conduct" to reject Government recommended plea-agreements be upheld by this Court, the efficacy of the entire system of negotiated pleas that serve the interests of both the Government *and* the judicial system will be called into question.[11]

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[11] This undermining of the system of plea-bargaining, the importance of which has long been recognized by this Court, *see* Santobello v. New York, 470 U.S. 257 (1971), became apparent when, despite the Justice Department's stated intention that the Petitioner should be removed from the U.S. without other conditions, an AUSA in the E.D. Va. issued Grand Jury subpoenas to Petitioner in November 2006 and January 2007, when he would have long been departed from the United States had the sentencing judge not made use of acquitted conduct to extend his sentence. While it may be possible to argue that these subpoenas did not violate the "no cooperation" standards of United States v. Garcia, 956 F.2d 41 (4th Cir. 1992), it cannot credibly be argued that this is *not* a change in position on the part of the Justice Department which deprives the Petitioner of the benefit of his plea bargain under *Santobello* and that the extended sentence made the Justice Department change-in-position possible. This issue is presently under appeal to the Fourth Circuit. (Notice of Appeal filed February 21, 2007). See, Appendix 2, p. 25 mentioning E.D. Va. specifically, AUSA Kriggsman: "I have been authorized...to further bind the Eastern District of Virginia..."

III. This Court should accept *certiorari* to determine whether a Defendant who has entered a guilty plea waives the right to appeal the use of "acquitted conduct" by the sentencing court, although the magistrate's Rule 11 colloquy reflects the *specific* instruction that: (a) the eventual sentence will not be based upon "acquitted conduct", and (b) the right to challenge the constitutionality of the sentence is not waived by the plea.

A. The April 14, 2006 Oral Assurance by the Magistrate Judge Precludes the Use of Acquitted Conduct by the Sentencing Judge in this Case.

The transcript of the April 14, 2006 Rule 11 hearing before the Magistrate Judge reflects the following exchange regarding the use of "acquitted conduct" in sentencing in *this* case.

> THE COURT: I don't think you have to worry about Judge Moody holding any matters *for which you were acquitted* against you at all....*I don't think on any counts you've been acquitted* of you can – *you should worry about the judge holding it against you*...
>
> What I – I'm simply pointing out here, *so people don't get blind sided as they move towards sentencing*...in this case the Court has agreed to the larger ones with regard to incarceration....You understand?
>
> THE DEFENDANT: Yes sir.

(Rule 11 hearing on April 14, 2006 before Magistrate Judge McCoun, Appendix 2, pp. 31-32) (*emphasis added*). Contrary to the April 14, 2006 plea hearing colloquy, the Defendant

and Counsel *were* "blind sided" by an improper exercise of judicial discretion, unsupported by the Rule 11 colloquy, which was not reasonable under U.S. v. Booker, on these facts.

It has long been established that oral pronouncements by the court, particularly the colloquy at the Rule 11 change of plea hearing, rather than the bare language of the written agreement itself, must be the record upon which the question of waiver is determined, "an oral pronouncement...control(s) over a conflicting written judgment, even if the oral statement is mistaken." *See* U.S. v. Khoury, 901 F.2d 975, 977-78 (11th Cir. 1990). And, the record of the May 1, 2006 sentencing hearing unambiguously demonstrates that the sentencing court *did* hold "acquitted conduct" against the Defendant, to justify extending his incarceration for nearly a year. And that the extended sentence, in effect, *voided* the "expedited deportation" which the Government had also agreed was in the best interest of justice, and the Government of the United States. And, most importantly, for which the Petitioner had bargained on good faith under Santobello.

In this case, Magistrate Judge McCoun specifically assured the Defendant that the sentencing court would *not* consider "acquitted conduct", even if the Government might use it in argument. However, as the record reflects the sentencing court *did* rely upon precisely this sort of "acquitted conduct" in extending the agreed-upon sentence.

B. The Rule 11 Plea Colloquy Makes Clear that the Petitioner Did *Not* Waive the Right to Appeal an Arguably "Unconstitutional" Sentence.

Moreover, the "plea colloquy" of April 14, 2006 before Magistrate Judge McCoun also included the Court's specific admonition that there are three bases upon which Appellant may properly appeal the sentence:

COURT: "...This language [in the written Plea

> Agreement] basically says that there are three specific ways by which you can initiate an appeal. The *first* way that you could initiate an appeal would be **if your sentence was for more than what the law allows...**
>
> The *second* way that his language [in the written Plea Agreement] says that you could take an appeal would be if the guidelines were calculated in a particular range and the judge went above that range...
>
> And the *third* way you could take an appeal would be **if something about the sentencing violated the Constitution...**
>
> The effect of this is that...you are not going to be able to appeal [the sentence], **as long as it is lawful and constitutional...**"

(Appendix 2, pp. 30-31, April 14, 2006 Plea Hearing Transcript (*emphasis added*)).

The Brief of Appellant below (Appendix 7) raised only those issues specifically described by the Magistrate Judge as being *excluded* from the waiver:

(a) Constitutional Due Process questions arising from the record of the sentencing hearing before the District Court in which the Court possessed an allegedly unlawful or unconstitutional vindictive motive, or the appearance thereof;

(b) Constitutional Due Process and Sixth Amendment questions regarding the imposition of a sentence by Judge Moody, *specifically relying upon acquitted conduct*, which is both allegedly unlawful and unconstitutional under the reasoning of the Supreme Court in Jones v. United States, 526 U.S. 227 (1999), United States v. Booker, 543 U.S. 220 (2005), as elaborated by Judge Barkett's dissent in U.S. v. Faust, 2006 WL 2035467 (11th Cir. July 21, 2006).

(c) Constitutional Due Process and violations of law of the Circuit, under U.S. v. Bushert, 997 F.2d 1343 (11th Cir. 1993) and U.S. v. Khoury, 901 F.2d 975, 977-78 (11th Cir. 1990), arising from reliance by the sentencing court on factors specifically *excluded* from consideration in sentencing in the plea colloquy before the Magistrate Judge.

In its Order of October 5, 2006, the panel of the 11th Circuit held that "the issues raised by Appellant in this appeal do not fall into the exceptions to the appeal waiver and that the appeal was knowing and voluntary," *citing* Bushert, 1350 and U.S. v. Benitez-Zapata, 131 F.3d 1444, 1446 (11th Cir. 1997) for support. However, the facts of *both* of these cases actually *support Appellant's* position that, as a matter of law: (a) the written Plea Agreement; (b) the Pre-Sentence Investigation; (c) the April 14, 2006 hearing before Magistrate Judge McCoun establish that any waiver of appeal in this case did not, and could not, apply to "unlawful or unconstitutional" rulings or conduct by the District Court or the Government following the plea.

In this case, the colloquy at the April 14, 2006 hearing is even more supportive of Petitioner's retention of the right to pursue an appeal of an "unlawful or unconstitutional sentence" than that in Bushert, much less Benitez-Zapata. In Benitez-Zapata, the Government contended that appeal was waived under the two-part test set out in Bushert, 997 F.2d at 1352 which requires the government to demonstrate either: (1) the district court specifically questioned the defendant about the terms of the waiver in the plea colloquy, or (2) the record shows that the defendant otherwise understood the full significance of the waiver. In this case, the colloquy at the April 14 plea hearing before Judge McCoun *specifically excluded* waiver of the to right appeal constitutional questions raised by the conduct of the district court *or* prosecution, following the entry of the plea.

The April 14 colloquy also specifically stated that "acquitted conduct" would not have any bearing on the

sentence imposed by the sentencing court (Appendix 2, April 14, 2006 Rule 11 hearing). Additionally, the sentencing court failed to make any specific inquiries at sentencing on May 1, 2006 regarding the Defendant's understanding of the scope of the waiver, as a matter of law, in the Eleventh Circuit, the magistrate judge's "oral pronouncements must prevail, even if... mistaken." Khoury at 977-78.[12]

Moreover, in the May 1, 2006 sentencing hearing in which the sentencing court declaimed broadly on its use of "acquitted conduct" in the exercise of its discretion, the sentencing court provided *no* notice that the Court would fail to follow the representations in the colloquy with the Magistrate Judge on April 14, 2006. In this regard, the *only* mention of the appellate process was the following:

> COURT: *To the extent permitted by your plea agreement*, you have the right of appeal from the judgment and sentence within ten days from this date. Failure to appeal within the ten-day period shall be a waiver of your right to appeal. The government also has a right to appeal from this sentence.

(May 1, 2006 Trans. Appendix 5, p. 64) (emphasis added).[13]

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[12] Other cases cited by the Government also are inapposite in that the change-of-plea colloquy upon which the appeals were based did not include a specific reference to either assurances that acquitted conduct would not be considered by the District Court, nor did any include specific exclusion of unlawful or constitutional post-plea conduct, as occurred in this case. *See*, U.S. v. Camacho, 233 F.3d 1308 (11th Cir. 2000) and U.S. v. Buchanan, 131 F.3d 1005 (11th Cir. 1997). *See also*, U.S. v. Grinard-Henry, 399 F.3d 1294 (11th Cir. 2005) and U.S. v. Bascomb, 451 F.3d 1292 (11th Cir. 2006)

[13] Nor did the sentencing court instruct Defendant Dr. Al-Arian that he could withdraw his plea, once the sentencing court had imposed a sentence which was completely contrary to Magistrate Judge McCoun's assurance that acquitted conduct would not be considered in sentencing.

On these facts, unlike the plea colloquy in Benitez, it is plain that the first prong of the Bushert test for waiver has not been met, *as a matter of law*. Moreover, assuming that Petitioner was only alleging a Rule 11 violation (which would also be excluded from the waiver, as articulated by Magistrate Judge McCoun), rather than violations of Due Process and the Sixth Amendment, the failure of the District Court is plain error under U.S. v. Camacho, 233 F.3d 1308, 1313 (11th Cir. 2000); U.S. v. Romano, 314 F.3d 1279, 1281 (11th Cir. 2002); U.S. v. Rodriguez, 398 F.3d 1291, 1299-1301 (11th Cir. 2005); and U.S. v. Wright, 154 Fed. Appx. 790 (11th Cir. 2005).

Moreover, since the sentencing court directly contravened the plea colloquy regarding "acquitted conduct" as a factor to be considered in exercising its discretion in sentencing, as well as committing violations of Rule 11 and the Fifth and Fourteenth Amendments in *addition to* violating the spirit of Booker, this appeal was improperly dismissed by the panel of the Eleventh Circuit pursuant to 11th Cir. Rule 42-4. By dismissing the appeal on waiver grounds, the Court of Appeals must have erroneously concluded that the use of "acquitted conduct" by the sentencing court was not a constitutional issue, in apparent violation of Booker/Cunningham/Jones. This can only be understood as a direct violation of Petitioner's inalienable right to at least one mandatory appeal *on the merits*.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner requests this Court: (a) to issue its Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit or, in the alternative, (b) to remand the case for briefing and argument on the merits, which have been thus far improperly denied by the court below or, in the alternative, (c) to enter an Order requiring that the original sentence, negotiated in good faith with the Government be instituted forthwith and that Dr.

al-Arian be permitted to depart the United States immediately, as originally agreed between the parties.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:03-CR-77-T-30TBM

SAMI AMIN AL-ARIAN

PLEA AGREEMENT

Pursuant to Fed. R. Crim. P. 11(c), the United States of America, by Paul I. Perez, United States Attorney for the Middle District of Florida, and the defendant, Sami Amin Al-Arian, and the attorneys for the defendant, William B. Moffitt and Linda G. Moreno, mutually agree as follows:

A. Particularized Terms

1. Counts Pleading To

The defendant shall enter a plea of guilty to Count Four of the Superseding Indictment. Count Four charges the defendant with Conspiracy to make or receive contributions of funds, goods or services to or for the benefit of the Palestinian Islamic Jihad, a Specially Designated Terrorist, in violation of 18 U.S.C. § 371.

2. Maximum Penalties

Count Four carries a maximum sentence of five years imprisonment, a fine of $250,000, and a term of supervised release of not more than three years. Each count carries a special assessment of $50 per felony count for offenses committed prior to April 24, 1996, $100 per felony count thereafter; for organizations the amounts are "$200" and "$400" respectively, said special assessment to be due on the date of sentencing.

3. Elements of the Offenses

The defendant acknowledges understanding the nature and elements of the offenses with which defendant has been charged and to which defendant is pleading guilty. The

elements of Count Four are:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan;

Second: That the object of the plan was to make or receive a contribution of funds, goods, or services, to, or for the benefit of, a Specially Designated Terrorist;

Third: That the defendant, knowing the unlawful purpose of the plan, willfully joined in it;

Fourth: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the "overt acts" described in the Superseding Indictment; and

Fifth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

4. Utilization of the Sentencing Guidelines

Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the United States will recommend to the Court that the Court determine the defendant's applicable guidelines range and defendant's guidelines sentence, with any applicable departures, pursuant to the United States Sentencing Guidelines.

5. Counts Dismissed

At the time of sentencing, the remaining counts against the defendant, Counts One, Three, Seven, Nine, Thirty-Eight through Forty and Forty-Four will be dismissed pursuant to Fed. R. Crim. P. 11(c)(1)(A).

6. No Further Charges

If the Court accepts this plea agreement, the United States Attorney's Office for the Middle District of Florida and the Counterterrorism Section of the United States Department of Justice agree not to charge defendant with committing any other federal criminal offenses known to the United States Attorney's Office or the Counterterrorism Section at the time of the execution of this agreement, related to the conduct giving rise to this plea agreement.

7. Sentencing Guideline Range

Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the parties agree that the appropriate disposition of this case is a sentence within the guideline range of 46-57 months. The parties agree that the adjusted guideline level for the offense to which the defendant is pleading guilty is Level 26, to be reduced by 3 levels for acceptance of responsibility to a Level 23, and a criminal history of Category One. The Court may accept or reject this agreement, or defer a decision until it has had an opportunity to consider the presentence report prepared by the United States Probation Office. If the Court rejects this agreement, it must give the defendant an opportunity to withdraw the plea of guilty and advise the defendant personally that if the plea is not withdrawn, the Court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

8. Deportation by the United States Immigration and Customs Enforcement - Stipulation and Cooperation

The defendant agrees to stipulate to deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (codified at 8 U.S.C. § 1228(c)(5)), and to cooperate with and provide to the United States Immigration and Customs Enforcement (ICE) prior to his transfer to ICE custody, any documentation necessary for the defendant's deportation to a country outside and not contiguous to the United States, including a travel document, validly issued by a country to the defendant. The defendant further agrees to arrange that said travel document will remain valid until the defendant has been successfully removed to the country that issued the travel document. The defendant agrees that the Court may make these provisions a condition of any sentence of probation or supervised release. Representatives of the Department of Justice agree to recommend to the Bureau of immigration and Customs Enforcement that it expedite its efforts to execute the judicial order of deportation to be

entered by the Court.

9. Recommendation as to Fine

Pursuant to Fed. R. Crim. P. 11(c)(1)(B), at the time of sentencing, the United States agrees to make no recommendation as to the imposition or amount of a Defendant's Initials fine. The parties understand that such a recommendation is not binding on the Court and that, if it is not accepted by this Court, neither the United States nor the defendant will be allowed to withdraw from the plea agreement, and the defendant will not be allowed to withdraw from the plea of guilty.

10. Recommendation

The parties understand that: a) the defendant is free to ask the Court to recommend that the Bureau of Prisons designate a particular facility or type of facility in which the defendant should be detained for the remainder of his sentence in this matter; and b) the government defers to the Bureau of Prison to designate the facility and type of facility in which the defendant should be detained for the remainder of his sentence in this matter.

11. Low End

Pursuant to Fed. R. Crim. P. 11(c)(1)(B), at the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United States will recommend to the Court that the defendant receive a sentence at the low end of the applicable guideline range, as calculated by the Court. The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

B. Standard Terms and Conditions

1. Monetary Penalties

The defendant understands that the Court will inform and determine that the defendant understands the maximum monetary penalties pursuant to Fed. R. Crim. P. 11(b)(1)(H - L). On each count to which a plea of guilty is entered, the

Court shall impose a special assessment, to be payable to the Clerk's Office, United States District Court, and due on date of sentencing. The defendant understands that this agreement imposes no limitation as to fine.

2. Supervised Release

The defendant understands that the offenses to which the defendant is pleading provide for imposition of a term of supervised release upon release from imprisonment, and that, if the defendant should violate the conditions of release, the defendant would be subject to a further term of imprisonment.

3. Sentencing Information

The United States reserves its right and obligation to report to the Court and the United States Probation Office all information concerning the background, character, and conduct of the defendant, to provide relevant factual information, including the totality of the defendant's criminal activities, if any, not limited to the counts to which defendant pleads, to respond to comments made by the defendant or defendant's counsel, and to correct any misstatements or inaccuracies. The United States further reserves its right to make any recommendations it deems appropriate regarding the disposition of this case, subject to any limitations set forth herein, if any.

Pursuant to 18 U.S.C. § 3664(d)(3) and Fed. R. Crim. P. 32(d)(2)(A)(ii), the defendant agrees to complete and submit to the United States Attorney's Office and the United States Probation Office, upon execution of this plea agreement, an affidavit reflecting the defendant's financial condition.

4. Sentencing Recommendations

It is understood by the parties that the Court is neither a party to nor bound by this agreement. The Court may accept or reject the agreement, or defer a decision until it has had an opportunity to consider the presentence report prepared by the United States Probation Office. The defendant understands and acknowledges that, although the parties are permitted to

make recommendations and present arguments to the Court, the sentence will be determined solely by the Court, with the assistance of the United States Probation Office. Defendant further understands and acknowledges that any discussions between defendant or defendant's attorney and the attorney or other agents for the government regarding any recommendations by the government are not binding on the Court and that, should any recommendations be rejected, defendant will not be permitted to withdraw defendant's plea pursuant to this plea agreement. The government expressly reserves the right to support and defend any decision that the Court may make with regard to the defendant's sentence, whether or not such decision is consistent with the government's recommendations contained herein.

5. Appeal of Sentence-Waiver

The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to Defendant's appeal defendant's sentence or to challenge it collaterally on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by Title 18, United States Code, Section 3742(b), then the defendant is released from his waiver and may appeal the sentence as authorized by Title 18, United States Code, Section 3742(a).

6. Department of Justice Agreement

It is further understood that this agreement is limited to the Office of the United States Attorney for the Middle

District of Florida and the Counterterrorism Section of the Department of Justice and cannot bind other federal, state, or local prosecuting authorities, although this office will bring defendant's cooperation, if any, to the attention of other prosecuting officers or others, if requested.

7. Filing of Agreement

This agreement shall be presented to the Court, in open court or in camera, in whole or in part, upon a showing of good cause, and filed in this cause, at the time of defendant's entry of a plea of guilty pursuant hereto.

8. Voluntariness

The defendant acknowledges that defendant is entering into this agreement and is pleading guilty freely and voluntarily without reliance upon any discussions between the attorney for the government and the defendant and defendant's attorney and without promise of benefit of any kind (other than the concessions contained herein), and without threats, force, intimidation, or coercion of any kind. The defendant further acknowledges defendant's understanding of the nature of the offense or offenses to which defendant is pleading guilty and the elements thereof, including the penalties provided by law, and defendant's complete satisfaction with the representation and advice received from defendant's undersigned counsel (if any). The defendant also understands that defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that defendant has the right to be tried by a jury with the assistance of counsel, the right to confront and cross-examine the witnesses against defendant, the right against compulsory self-incrimination, and the right to compulsory process for the attendance of witnesses to testify in defendant's defense; but, by pleading guilty, defendant waives or gives up those rights and there will be no trial. The defendant further understands that if defendant pleads guilty, the Court may ask defendant questions about the offense or offenses to which defendant pleaded, and if defendant

answers those questions under oath, on the record, and in the presence of counsel (if any), defendant's answers may later be used against defendant in a prosecution for perjury or false statement. The defendant also understands that defendant will be adjudicated guilty of the offenses to which defendant has pleaded and, if any of such offenses are felonies, may thereby be deprived of certain rights, such as the right to vote, to hold public office, to serve on a jury, or to have possession of firearms.

9. Factual Basis

Defendant is pleading guilty because defendant is in fact guilty. The defendant certifies that defendant does hereby admit that the facts set forth below are true, and were this case to go to trial, the United States would be able to prove those specific facts and others beyond a reasonable doubt:

FACTS

a. During the period of the late 1980s, and early to mid-1990s, defendant Al-Arian was associated with several organizations, including the Palestinian Islamic Jihad. Defendant Al-Arian knew that co-defendants Ramadan Abdullah Shallah (Shallah), Bashir Musa Mohammed Nail (Nafi) and Mazen Al-Najjar (Al-Najjar) were also associated with the Palestinian Islamic Jihad.

b. On or about January 23, 1995, President William Clinton issued Executive Order 12947, which declared a national emergency regarding the grave acts of violence committed by foreign terrorists that disrupted the Middle East Peace Process. Executive Order 12947 prohibited certain transactions, including the making or receiving or any contribution of funds, goods, or services, to or for the benefit of organizations and individuals who were declared "Specially Designated Terrorists." Executive Order 12947 also made unlawful any transaction that evaded or avoided, or had the purpose of evading or avoiding, or attempted to violate, any of the prohibitions set forth in the Order. By January 24, 1995, the United States had designated the

Palestinian Islamic Jihad, Sheik Abd Al Aziz Awda and Fathi Shiqaqi as Specially Designated Terrorists. Later that year, in November, 1995, the United States designated Ramadan Shallah as a Specially Designated Terrorist.

c. Defendant Al-Arian performed services for the PIJ in 1995 and thereafter.

d. Such services included filing for Immigration benefits for individuals associated with the PIJ, hiding the identities of individuals associated with the PIJ, and providing assistance for an individual associated with the PIJ in an United States Court proceeding. The services are described with more particularity in the following paragraphs.

e. On or about February 6, 1995, defendant Al-Arian had a telephone conversation with a co-conspirator and discussed the recent Presidential Executive Order against terrorists.

f. Defendant Al-Arian was aware that the PIJ achieved its objectives by, among other means, acts of violence.

g. On or about August 25, 1995, defendant Al-Arian filed a visa renewal petition with the INS on behalf of co-defendant Nafi.

h. On or about September 1, 1995, co-defendant Al-Najjar wrote a $5,000 check drawn on the Muslim Women Society (MWS) account, payable to World and Islam Studies Enterprise (WISE) which was deposited into the WISE account.

i. On or about October 25, 1995, co-defendant Al-Najjar executed an Affidavit filed with the INS in support of Nafi's alien employment petition. In the Affidavit, Al-Najjar stated that he and defendant Al-Arian had sufficient financial means to fund Nafi's salary. Al-Najjar further stated that in 1993, he contributed $36,000 to WISE and that in January and February 1994, he had in excess of $50,000 available to support the operations of WISE.

j. On or about October 30, 1995, in the early

morning hours, defendant Al-Arian received a telephone call from a co-conspirator in which the coconspirator asked whether defendant Al-Arian had heard that Fathi Shiqaqi had been killed. Defendant Al-Arian indicated that he had heard and then refused to talk. Later that day, he had a telephone conversation with AI-Najjar. Defendant Al-Arian indicated he wanted to meet with Al-Najjar.

k. On or about October 30, 1995, co-defendant Nafi made a telephone call to defendant Al-Arian. Nafi whispered during this conversation and defendant Al-Arian said the matter had been complicated and inquires had begun.

l. On or about October 30, 1995, defendant Al-Arian had a telephone conversation with a journalist with The St. Petersburg Times. When the journalist asked about Shallah being named the Secretary General of the PIJ, defendant Al-Arian falsely stated that Shallah's name must have been mixed up with someone else and falsely stated he only knew Ramadan Abdullah Shallah as Ramadan Abdullah. Later, defendant Al-Arian had another telephone conversation with a journalist with The St. Petersburg Times. During this conversation, defendant Al-Arian expressed shock and surprise and falsely stated there was nothing Shallah had done while at WISE to indicate any political affiliation. Defendant Al-Arian falsely stated that Shallah was not involved in any political activities while at WISE and that Shallah had been engaged in only scholarly work.

m. On or about October 31, 1995, defendant Al-Arian and codefendant AI-Najjar caused a facsimile to be sent from WISE which explained its mission and its experience with Shallah and falsely denied any knowledge of Shallah's association or affiliation with any political group in the Middle East.

n. On or about August 7, 2000, defendant Al-Arian, who was in the Middle District of Florida, had a telephone conversation with co-defendant Nafi, who was in England, about utilizing a contact of Nafi's in Egypt to obtain

travel documents for Al-Najjar. They then spoke about Nafi's problems with his immigration status in the United States. Then they had a coded conversation about the account to which Nafi had sent money to assist in the defense of co-defendant Al-Najjar's ongoing INS proceeding.

o. On or about August 8, 2000, defendant Al-Arian, who was in the Middle District of Florida, called a co-conspirator, who was outside the State of Florida. When defendant Al-Arian asked co-conspirator if any thing was deposited in his account or his wife's account, the co-conspirator replied there were "ten shirts" (referring to a sum of money). Defendant Al-Arian then directed the co-conspirator to send nine of them to the account of another co-conspirator.

p. Later in the day on August 8, 2000, defendant Al-Arian, who was in the Middle District of Florida, had a telephone conversation with co-defendant Nafi, who was outside the State of Florida, and told Nafi that the issue of "the magazines" (referring to a sum of money) was resolved, but the travel document had not been received from Egypt. They then discussed utilizing the press to support Al-Najjar in his INS hearing by setting up an interview with Abd Al Aziz Awda (Awda) to show that he had the permission of the Israelis to reside in the Gaza Strip. Defendant Al-Arian then asked Nafi for Awda's telephone number. Nafi told him to call back the next day to get the number. Additionally, they discussed Nafi's response to allegations in the press that he was a member of the PIJ.

q. On or about August 8, 2000, defendant Al-Arian directed codefendant Hatem Naji Fariz (Fariz) to arrange a newspaper interview with Awda.

r. On or about August 9, 2000, defendant Al-Arian and co-defendant Fariz had a telephone conversation about causing one or more newspaper articles to be written on Awda. They desired to utilize these articles in the INS hearing regarding Al-Najjar and wanted them to portray Awda as a

religious figure with no relation to the PIJ.

10. Entire Agreement

This plea agreement constitutes the entire agreement between the government and the defendant with respect to the aforementioned guilty plea and no other promises, agreements, or representations exist or have been made to the defendant or defendant's attorney with regard to such guilty plea.

11. Certification

The defendant and defendant's counsel certify that this plea agreement has been read in its entirety by (or has been read to) the defendant and that defendant fully understands its terms.

DATED this 28th day of February, 2006.

PAUL I. PEREZ
United States Attorney

By: s/
Terry A. Zitek
Executive Assistant United States Attorney

s/
Sami Amin Al-Arian
Defendant

s/
William B. Moffitt
Attorney for Defendant

s/
James R. Klindt
First Assistant United States Attorney

s/
Linda G. Moreno
Attorney for Defendant

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:03-CR-77-T-30TBM

UNITED STATES OF AMERICA

-vs 14 April 2006

SAMI AMIN AL-ARIAN, 1:10 p.m. Defendant.

TRANSCRIPT OF PROCEEDINGS
(CHANGE OF PLEA HEARING)
BEFORE THE HONORABLE THOMAS B. MCCOUN, III,
UNITED STATES DISTRICT COURT MAGISTRATE

APPEARANCES:

For the Government: WALTER FURR, ESQUIRE
TERRY ZITEK, ESQUIRE
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SIMON ALEXANDER GAUGUSH, ESQUIRE
DELMAR LEE FUGATE, ESQUIRE
Zuckerman, Spaeder
101 East Kennedy Boulevard
Suite 1200
Tampa, Florida 33602

ALSO PRESENT: SAMI AMIN AL-ARIAN (Defendant)
SONYA COHN (Courtroom Deputy Clerk)

(appearances continued on next page)

STENOGRAPHICALLY REPORTED
COMPUTER-AIDED TRANSCRIPTION

REPORTED BY: **SHERRILL LYNN JACKSON, RPR**
Official Court Reporter
801 North Florida Avenue Suite 13A
Tampa, Florida 33602
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EXHIBITS

(None marked or received)

(1:10 p.m.) PROCEEDINGS

THE COURT: Okay. Let's call the case.

THE CLERK: *United States of America vs. Sami Amin Al-Arian,* Case Number 8:03-cr-77-T-30TBM.

THE COURT: Okay. For the Government, we have Miss Krigsman, Mr. Zitek, and Mr. Furr; and for Dr. Al-Arian, we have Miss Moreno and, at the request of the Court, Jack Fernandez, Lee Fugate, and they have with them Simon Gaugush.

Mr. -- Dr. Al-Arian, my understanding is that you're here to plead guilty to a count in the superseding indictment, Count 4.

THE DEFENDANT: Yes, Your Honor.

THE COURT: As I suggested to you a moment ago,

this matter will take about 20 or 30 minutes to work through, and it involves you and I having a conversation. I'll be asking a number of questions, and you'll need to respond to those questions. I'm required to do this under oath, so let's begin by having you -- you can remain seated, but simply raise your right hand.

THE CLERK: Do you solemnly swear or affirm that the answers you will give to the answers propounded by the Court or counsel will be the truth, whole truth, and nothing but the truth?

THE DEFENDANT: I do.

THE CLERK: Thank you.

THE COURT: I think, for purposes of the record, we need to indicate that the proceeding is being conducted in camera. A notice of the proceeding was filed. However, it was filed under seal. The public has not -- not been alerted to the pendency of the proceedings.

My recollection is that that is at the request of both parties; and both Judge Moody and I think it appropriate in the circumstances that the proceeding go forward in camera.

I am going to ask that the court reporter transcribe the proceedings and make that a part of the sealed record. That sealed record in relation to the plea and so forth will be open to the public at an appropriate time.

Mr. Zitek.

MR. ZITEK: Technically, Judge, the decision to hold this hearing was made on February 27th by Judge Moody at the request of the Defense and over the objection of the United States because the United States -- our position ordinarily is that hearings of this nature are to be held in the public. We made our argument at that time. The judge overruled it. And so, we just wanted to -- in the record, we have a continuing objection, but we're otherwise here.

THE COURT: Okay. I think that the -- in those

circumstances where the Government has made an objection here, I think it needs to be said that the reason we are proceeding in camera is that this is -- the plea that is going to be entered here is in the nature of a conditional plea.

If I move forward and find it's freely and voluntarily entered today, I will enter an R&R, which will allow a ten-day objection period. It's possible during that period that something could happen to the plea and it might not be accepted; and in those circumstances, the argument is -- and I think it's one that the Court has given weight to -- the argument is that it would be unfair to Dr. Al-Arian, were he in a position to have to go to trial in this matter, if the fact that he had attempted to enter a plea was made a matter of public knowledge since the -- and since the sentencing would go forward rather quickly as -- and the trial is not too far in the distant future were it necessary to have a trial.

I think Judge Moody and I both concur that it's in the best interest of the Defendant, and there are compelling reasons for allowing this matter to proceed in camera to the exclusion of the public.

As I said, we will direct that a transcript of the proceedings today be put together as promptly as possible. That transcript will be filed in the sealed record of the Court at an appropriate time. The pleadings related to the plea here, as well as the transcript of the proceedings, will be made available to the public.

We have one other matter that I'd like to address before we get back to Dr. Al-Arian in the matter at hand. There was a request by the Federal Public Defender's Office to appear at the proceedings, and two of their members are present in court.

It was granted yesterday, but the -- frankly, the discussions that Judge Moody and I had were to allow the Defendant to address the matter were there any other

objections to allowing them to proceed or to be privy to the proceedings.

Miss Moreno, do we need to discuss that further?

MS. MORENO: No, Your Honor. I did state my objections and had Miss Guagliardo put that before Your Honor, and His Honor apparently considered that and allowed them to be present. We do have concerns about the confidentiality of what goes on here. That was the substance of my objection.

THE COURT: Well, obviously if we allow Miss Guagliardo and Mr. Beck, who represent the Co-Defendant in this matter, to participate, they're duty-bound to keep 24 these matters private and confidential.

You understand that, Counsel?

MR. BECK: We do, Your Honor.

THE COURT: The -- my understanding is that the posture of the Fariz matter is not altogether different from the posture of the Al-Arian matter; is that correct? Are you heading toward entering a plea in this matter?

MR. BECK: We are involved in negotiations, Your Honor.

THE COURT: Has there been a plea agreement accepted?

MR. BECK: No, there has not.

THE COURT: All right.

Well, there being no new objections, Judge Moody's ruled on the matter. We'll allow them to participate, but obviously the matters that are discussed here are private, confidential, and shall not be disclosed by those counsel or anybody else present in the -- in the courtroom today.

For the record, we have members of the investigative team and otherwise just necessary courtroom personnel present today.

Dr. Al-Arian, let's get on with the plea here.

I just placed you under oath. The significance of that is that I want you to answer my questions truthfully.

There's no benefit to you in giving me a false answer. If you were to lie to me, because of the fact you're under oath, you could be prosecuted separately for that lie; and, therefore, you need to make sure that all your answers are truthful.

Obviously what you do here today is a significant act on your part; and, therefore, it's very important that you understand the entirety of the proceedings.

If at any time I say something to you that you do not understand, I want you to stop me and let me clarify it for you; or if at any time you wish to speak to your attorney, just let me know that, and we'll allow that.

The record should reflect that on two occasions during the proceedings in this matter the Court has looked to Mr. Fugate and Mr. Fernandez of the Zuckerman, Spaeder firm for assistance as -- acting really as friends of the Court; and in that capacity, they have been involved with the negotiations with the Government, and we request that they be present again today.

So, if, in fact, you need to speak to Mr. Fernandez or Mr. Fugate or the immigration attorney, Mr. Gaugush, then feel free to do that as well.

Finally, this young lady is a court reporter. She's attempting to take down everything that's said in these proceedings. I want to make an accurate record here.

It will become a part of the public file eventually; and for that reason, I need you to answer all of my questions out loud. I can watch a person shake their head like this or like this (indicating) and know what they mean. She can't take down a head shake, so you need to answer my questions, if you would, sir.

THE DEFENDANT: Yes, sir.

THE COURT: How old are you, sir?

THE DEFENDANT: Forty-eight.

THE COURT: How far in school did you get?

THE DEFENDANT: I've got my Ph.D.

THE COURT: Obviously you can read and write in English.

THE DEFENDANT: Yes, sir.

THE COURT: Any other language?

THE WITNESS: Arabic, and I understand French.

THE COURT: Under the influence of any alcohol or drugs today?

THE DEFENDANT: No, sir.

THE COURT: Are you taking any medications in the jail?

THE DEFENDANT: I take tablets for controlling diabetes.

THE COURT: Okay. How often do you take those tablets?

THE DEFENDANT: One drug twice a day, one drug once a day.

THE COURT: Okay. Are there any side effects to that medication? Does it affect your thinking in any way?

THE DEFENDANT: No.

THE COURT: Do you take any other kind of medication for any other type of condition?

THE DEFENDANT: No.

THE COURT: Have you been treated recently at the jail for any physical ailment?

THE DEFENDANT: No, sir.

THE COURT: Have you ever, in the past or at any time during the pendency of these proceedings, been treated by a psychiatrist or psychologist for any type of mental condition?

THE DEFENDANT: No, sir.

THE COURT: You thinking clearly today?

THE DEFENDANT: Yes, I do.

THE COURT: All right. The -- according to the sealed plea agreement in this case, the count you're pleading guilty to is Count 4 of the superseding indictment, which is -- which is an allegation that you conspired to commit offenses against

the United States.

We'll talk more about that in a moment.

Given the nature of the charge, as you're aware, this file has been assigned to two judges throughout the proceedings. I happen to be the magistrate judge assigned to the proceedings; and, as you know, Judge Moody is the district judge assigned to the proceeding. Judge Moody is a higher-level judge than I am.

As you experienced, the trial of these criminal matters is before the district judge, not myself; but the rules say you can plead either before the district judge or the magistrate judge; and we -- because you get to make a choice, I need to talk to you about it.

We do use this written form that you were previously presented, and it appears that you signed it, along with Miss Moreno. Do you understand when you signed the form you were agreeing to have me conduct the plea?

THE DEFENDANT: I do.

THE COURT: You understand that when you come back for sentencing in this matter, that that sentencing is going to be before Judge Moody, not me?

THE DEFENDANT: I understand.

THE COURT: Now, I'm going to explain the count which is designated by your plea agreement as the pertinent count, which is Count 4, in summary terms and indicate to you the potential punishment on that charge. Then I'm going to ask you how you plead, and you may plead either guilty or not guilty as you see fit.

As you know from having reviewed the superseding indictment for many, many months and having gone through a trial in this matter, Count 4 accuses you of a conspiracy to make and receive contributions of funds, goods, or services which were for the benefit of the Islamic Jihad, which became at some point a specially designated terrorist organization.

The allegations are set out in some detail, both

at the outset of the indictment and in Count 4, and those allegations essentially charge that you committed a -- a conspiracy to violate offenses against the United States.

This is a five-year offense, meaning that the maximum punishment that can be imposed is five years in prison; and we're going to talk in a few moments about the fact that through plea negotiations that amount has been reduced, but at this point I'm required to tell you the maximum term, and the maximum term for a 371 conspiracy is five years in prison.

In addition to that, the Court can impose a fine up to $250,000, and you can be placed on a period of three years' supervised release. We'll talk about all of this punishment in a bit.

In addition to the punishment, the Court is required to impose a special assessment, kind of like court costs, and the amount of a special assessment is $100, and that sum is due at the time or shortly after sentencing.

Do you understand the allegations against you in Count 4 of the superseding indictment?

THE DEFENDANT: Yes, I do.

THE COURT: You understand the potential punishment in this case?

THE DEFENDANT: I do.

THE COURT: As to this charge, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Let me explain to you that your guilty plea is a significant act. By pleading guilty, you're not only admitting the charge, but you're, in effect, giving up or waiving a number of rights that you have.

As you know, in our system, we have a right to the presumption of innocence. You have a right to have a jury trial. In this case, you have the right to have another jury trial in order to contest the allegations against you; and at that trial, your attorney would be permitted to assist you.

As you know from the last trial, in our system, you have a right to remain silent; and the effect of that is that at this stage of the proceeding we don't make you prove your innocence at the trial, we make the Government prove your guilt.

So, if instead of pleading guilty here you wish to have a retrial, you would be entitled to such a retrial, and you would have the right to the assistance of a lawyer. The burden would be on the prosecutor to prove the case against 1 you, and no one can force you to be a witness if you didn't choose to be.

The -- I'm required to review for you the essential elements of this offense. They are set out at page 2 of the plea agreement. The -- were you to try this count instead of pleading guilty to it, the burden would be on the prosecutor to bring in witnesses and evidence to prove up essentially the four -- the five elements they've listed here at page 2.

Essentially the Government would have to show that two or more people came to an agreement, an understanding, to commit some unlawful plan. In this case, it was to provide material support to the PIJ.

The second element they would have to prove beyond a reasonable doubt would be that the object of the plan was to make and receive contributions, goods, or services to this specially designated terrorist organization.

The third element is that you were a knowing and willful participant in the plan. And then the Government on top of that would have to show that during the existence of the conspiracy, one or more of the alleged co-conspirators in this case committed at least one of the overt acts which are set forth in some detail in the indictment; and the Government would further have to show that that overt act was allegedly committed at or about the time of the alleged conspiracy in an effort to carry it out.

As you know from the last trial, what happens in

these matters if you go to trial, at the conclusion of all the evidence and the arguments, the jury is advised as to each charge of the essential elements. They are further instructed that if the Government has proved each of the essential elements beyond a reasonable doubt, it should find you guilty.

As you also know, they're advised that if the Government fails to prove even one of these elements, the jury is instructed to find you not guilty.

If you chose to go to trial instead of pleading guilty to the count, the -- your lawyers could participate again, whether it would be Miss Moreno or some other counsel. You would have counsel representing you. Again, they could cross-examine all of the Government witnesses. They could try to keep out any evidence they didn't think was admissible.

The law allows that no one could force you to testify if you did not wish to testify. However, if it was your desire to take the stand in this second trial, you could certainly do so.

Additionally, you could call other witnesses in your defense, whether they were civilian or law enforcement witnesses, if they had favorable information to you. You'd 1 have the right to subpoena those witnesses and make them come to court and make them testify if that was your desire.

Now, I'm explaining the rights to you here because I want you to understand the full consequences of the guilty plea.

As I say, by pleading guilty, you're not just admitting this particular charge, but you are effectively giving up or waiving each of these rights. By moving forward with a guilty plea, there will not be a retrial. You will not challenge the allegations as they relate to this particular charge; and in a short period of time you will be brought back, and at that point you will be sentenced.

Now, do you understand that these are the consequences of pleading guilty?

THE DEFENDANT: I do, Your Honor, but --

MS. MORENO: Your Honor, in the Court's recitation of the first element of the offense, I think the Court used the phrase "material support." Material support is not involved in this particular count.

THE COURT: Okay. Funds, goods, or services.

THE DEFENDANT: Yeah. I'm pleading to services.

THE COURT: All right.

The -- it's a disjunctive -- as I recall, disjunctive statute in the sense that the Government doesn't have to prove all; they merely have to prove one or the other. But you're conceding the services aspect?

THE DEFENDANT: Yes, sir.

THE COURT: Other than that, do you understand the consequences of pleading guilty?

THE DEFENDANT: Yes, I do.

THE COURT: By pleading guilty, you're not going to contest the matter; and in a short period of time, whenever the matter is deemed to be appropriate for sentencing, you will be brought back and sentenced.

Now, your lawyers have negotiated a plea agreement on your behalf, and this plea agreement is in some respects very much like a contract. What you say you're going to do in the contract we expect you to do. What the prosecutor says their office is going to do we expect them to do.

In the broad sense, the plea agreement is not a contract with the Court. Now, in your case, there -- this is a particular type of plea agreement, and we're going to get into that in some detail in a moment; but in a broad sense, the plea agreement is not binding on the Court except where it indicates that it is binding.

And so that I can make sure that you understand how this works, I'm going to go through various aspects of the plea agreement with you, and I'd like you to follow

along with me. Obviously, if you have questions, stop me and we'll work through those; and if at any time you need to talk to either Miss Moreno or Mr. Fernandez, please indicate that as well.

I want you to begin by looking at page 3. On this page, there begins certain concessions that your lawyers have negotiated with the Government in this matter. So, at Paragraph 5, the Government has agreed with your counsel that at the time of sentencing all the remaining counts against you will be dismissed pursuant to Rule 11.

Now, in the next paragraph, Paragraph 6 there, there is an agreement that the United States Attorney's Office for the Middle District of Florida and the Counter-Terrorism Section of the United States Department of 14 Justice agree not to charge you with committing any other federal crimes or offenses about which they have knowledge. As I understand it, the Government needs to speak to this provision a little bit.

MS. KRIGSMAN: Yes, Your Honor. I have been authorized by the Deputy Assistant Attorney General of the Criminal Division to further bind the Eastern District of Virginia such that if the Court accepts the plea agreement, the United States Attorney's Office for the Eastern District of Virginia likewise will not charge the Defendant with committing any other federal crimes known to that United States Attorney's Office at the time of the agreement related to the conduct giving rise to the agreement.

THE COURT: Okay. At the bottom of page 3, there's another concession -- a significant concession that has been made. The parties, your counsel, and counsel for the Government have agreed that the appropriate disposition in this case as it relates to sentence will fall within a guideline range of 46 to 57 months; and this is arrived at by a guidelines calculation which results in a digested level of -- Level 23 and a criminal history of 1.

Now, the plea agreement suggests that the Court

may accept or reject this aspect of the agreement or defer a decision. However, an order has been entered by Judge Moody as of yesterday in which he has indicated that he accepts the guidelines calculation made -- agreed to by the parties and as calculated by Probation. So, in this case, this is an example of -- of something that the Court has agreed to ahead of time, and you are assured that your sentence will fall within this range; and should something happen that it does not, you'll be permitted to withdraw the plea.

If you go to the bottom of page 4, there is the next concession that has been negotiated by your lawyers. At this section -- excuse me. In this section, it is agreed by the United States that they will make no recommendation as to the imposition or amount of any fine in this case. As I indicated to you and as I'll talk more about in a minute, there can be a fine as part of the punishment. It can be as high as $250,000. In this case, the Court will make no recommendation with regards to that.

At Paragraph 10, there is a further agreement that your counsel can ask the Court to recommend to the Bureau of Prisons a particular facility or a particular type of facility in which you should have to spend the rest of any sentence that you must serve in this matter, and the Government indicates that it will defer to the Bureau of Prisons to designate the appropriate facility and type of facility.

And then next at page 5, Paragraph 11, there is a provision by which the Government has agreed in part of this plea agreement that they will recommend to the Court that you receive a sentence which is at the low end of any sentencing guideline range in this matter. In other word, it would be at the low end of the 46 months. The low end has been agreed to.

Now, each of these provisions that I've highlighted here is a significant one. It is negotiated with the prosecutor, obviously, to put you in the best possible position for sentencing and, also, to get you the best possible sentence.

I want to point out, however, that certain of these provisions and, in particular, that last one that I mentioned are not binding provisions on the Court. These type concessions essentially are recommendations to the judge as to what he should do with your sentencing.

Now, obviously, the Government, if this case moves forward, will be required to dismiss all remaining counts; but in matters such as the recommendation related to a fine or the recommendation related to a facility or the low-end disposition recommendation, these are, in effect, nothing more than recommendations to Judge Moody as to what he should do at your sentencing, and you need to be very clear that they're not binding recommendations.

It is entirely possible -- entirely possible that he may consider these representations but choose to do something different. This means that he may not recommend a facility that your lawyer requests. It may mean that he will, in fact, impose a fine and reject the suggestion that he not do so.

And, in particular, with regard to the low-end disposition provision at page 5, he may not give you the benefit of that recommendation. He might see something in the presentence report. He might hear something at sentencing. He might recall something from the trial. There might be any number of factors that could come into play that would prompt him to determine that it is not appropriate to give you the benefit of that provision; and, if so, you will not get the benefit of that provision.

In this instance, unlike the guidelines calculation -- in this instance, these type of recommendations, because they're not binding on the Court, mean that if the judge chooses to do something different, you will not be allowed to back out of your plea or withdraw your plea. In other words, if he doesn't give you -- I have no clue what you sentence is going to look like, except it will fall in the suggested range; but if he doesn't give you a low-end disposition, it's not a basis to withdraw the

plea, because that's how this type of provision works. Do you understand that?

THE DEFENDANT: I understand.

THE COURT: Okay. Good.

Now, obviously your part of the deal is that you have agreed to plead guilty to a disposition falling -- falling in a particular sentencing range. I want to talk to you about sentencing here and some other aspects of this plea agreement. I am certain that what I say is going to be repetitive of things you have been advised of by your lawyers. I want you to bear with me, however, because these are -- I'm going to give it to you from the perspective of the Court; and, again, if there's any question about this, I want you to stop me.

As indicated, the maximum term in this case would ordinarily be 60 months but, based on the plea negotiations, is a maximum term of 57 months incarceration.

The Court, on your sentencing day, is going to consider the agreement that has been entered into and will again consider the guideline calculations, and you're going to hear some discussions on sentencing day about your guidelines and how they've been computed. Even though these guidelines are not binding on the Court, your sentence has been calculated through the use of them. This has been found acceptable to the Court. So, you're going to hear some discussions about these guidelines with the -- if this matter moves forward with the understanding being that the range is 46 to 57 months.

You need to be clear that as a result of the plea to this charge you are going to be sentenced to a term within this range and you will end up serving the full amount of that sentence. Under the guidelines scheme, we don't have early-release programs anymore. Programs like parole where people used to get out after doing a third of their sentence have been done away with. So, under the guideline scheme, whether you receive 46 months, 57 months, or something in

between, you should expect you'll have to serve the full amount of the sentence. Statistically, the best you can hope for is a sentence which would be 85 percent of the term of the incarceration. You can earn some good time with good behavior; but I want you to understand that even though your lawyers have locked in a particular range, this is going to result in the imposition of a term of imprisonment, and you should expect that you will have to serve the full amount of that term, whatever it may be. Do you understand that?

THE DEFENDANT: I do.

THE COURT: Okay. In addition to the term of incarceration, which is assured you in this matter, the judge is going to consider the imposition of a fine. Now, whether or not he's going to impose a fine in this case, I can't say. The imposition of a fine depends on a number of circumstances, not the least of which is your ability to pay, but it is one of the forms of punishment that the judge can use. In this case, it can be for as much as $250,000; and as you sit here, you need to understand that it's entirely possible that the judge could impose a fine, and it could be for that amount. You understand that?

THE DEFENDANT: (Nods head.) Yes.

THE COURT: That fine can be in addition to any term of incarceration as well. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The Court will likely impose a term of supervised release to follow your term of incarceration. Supervised release is like being put on probation after you have done your prison sentence. The way it works is that when a person is released, they're assigned to a probation officer, there's conditions put on them, and they're expected to follow the rules. If they break the rules, they get violated and they come back to court; and if their violation is serious enough, they can go to prison for breaking the rules of supervised release.

Now, in your case, I'm required to tell you that supervised release is part of the expected disposition in this case, and I think the Court likely will impose some period of supervised release to follow your imprisonment; but, additionally, as part of your plea agreement, as you are aware, you have agreed as a condition of your plea that you will stipulate to deportation. Thus, at page 4, Paragraph 8, you agree and stipulate to deportation pursuant to the specified provisions of the Immigration and Nationality Act and further agree that you'll cooperate with the Bureau of Immigration in facilitating that deportation.

The Government, in turn, indicates that they will use their best efforts to expedite the deportation as well.

So, while I think it is fair to advise you that you will receive some period of supervised release as part of your sentence, and if you are released and allowed to remain in the United States, you should expect that you will have to serve that period of supervised release. The greater likelihood, according to the plea agreement, is that you're going to be deported, and supervised release will be a moot point at that point. You understand?

THE DEFENDANT: I do.

THE COURT: Okay. I want to ask you to go to page 6, Paragraph 3, for a moment. I always pause in this provision and tell whoever I'm taking a plea from -- I paraphrase the first part of it for anybody I'm taking a plea from.

Here the Government says it reserves the right to tell the Court and Probation -- that's kind of already come and gone -- but to tell the Court things about you or this crime that they think are significant, and they reserve the right to tell the Court about all the crimes that they think you've been involved in.

The reason I highlight that provision is because, in effect, it allows the Government leeway at sentencing to speak in aggravation if it chooses to do so. Now, this is a

pretty tight plea agreement. It's intended to get you a sentence within a specified range, and I think you'll -- you can be assured that your sentence will fall within that range; otherwise, you'll be allowed to withdraw your plea agreement.

It does not mean that the Government will not appear at your sentencing and speak in aggravation against you and your activities or the crime that occurred in this particular instance. If that happens, you don't have to agree with anything that they say. You will have the opportunity to rebut anything they say.

I simply always point this provision out to indicate that it is not a breach of this agreement if that occurs, because they've sort of reserved that right despite the fact that they made these other concessions with you.

Do you understand that?

THE DEFENDANT: (Gestures.)

(Pause.)

MS. MORENO: Your Honor, the question with respect to this particular language used in Paragraph 3 of the sentencing information where Dr. Al-Arian raised the question when Your Honor indicates and uses the terminology "crimes," in this particular situation, unlike most situations, we're post-trial with acquittals and mistried counts --

THE COURT: I don't think you have to worry about Judge Moody holding any matters for which you were acquitted against you at all. The Government may seek to argue that activity, but I don't think on any counts you've been acquitted of you can -- you should worry about the judge holding it against you.

What I -- I'm simply pointing out here, so people don't get blind-sided as they move towards sentencing, is that even though there are these concessions and the Government is bound by them, in this case the Court has agreed to the larger ones with regard to incarceration. If

the Government -- I expect there will be statements on both sides at sentencing, and some of the things you hear from the Government you may not agree with or appreciate; but it's not a breach of this agreement, it's not a basis to back out of the agreement if that happens, because they reserved that right. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: In this case, if the plea goes forward and it is accepted by Judge Moody, it will not alter at all the fact that the sentencing range is going to be between 46 and 57 months. That will be a given throughout the proceedings, but that will not prevent the Government from saying what it feels is an appropriate statement at your sentencing.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Go to page 7, bottom of the page, Paragraph 5. Now, this is standard language put in all the Government plea agreements and still is substantially applicable even in your circumstances. This language is inserted in the plea agreement to cut down or limit or restrict your right to appeal in this case. This language basically says that there are three specific ways by which you can initiate an appeal. The first way that you could initiate an appeal would be if your sentence was for more than what the law allows. I told you the maximum fine is $250,000. If you had had a $260,000 fine as part of your punishment, it's illegal because it's more than the law allows, and you could appeal it.

The second way that this language says that you could take an appeal would be if the guidelines were calculated in a particular range and the judge went above that range. If Judge Moody -- and I don't think you have to worry about this happening if this goes forward; but if Judge Moody were to bust the plea agreement and sentence you to, say, 60 months, that's above the guideline calculation. That would be something that you could appeal.

And the third way you could take an appeal would

be if something about the sentencing proceeding violated the Constitution.

Except in those three circumstances, however, this language is intended to take away your right to appeal. If you read it carefully, it says that the only other way you could appeal is if for some reason the Government appeals; and then if that happened, all bets are off, and you could appeal whatever you wish.

The effect of this is that on your sentencing day, when you appear, if the Judge sentences you within this calculated range that has been agreed to, you're going to be stuck with that sentence, meaning, you're not going to be able to appeal it, even if it's on the high end of that range, as long as it is lawful and constitutional. You understand that?

THE DEFENDANT: I do.

THE COURT: The effect of this is if you got the full 57 months, for instance, that would be perhaps more than you would anticipate; but because of the fact it was in the calculated range, it is lawful, absent some constitutional violation, you're not going to be able to appeal it. You understand that?

THE DEFENDANT: I do.

THE COURT: The -- let me ask you, beyond this plea agreement -- beyond the written plea agreement, have you been promised anything from anybody that is an inducement to you to appear in court today and plead guilty?

MS. MORENO: May we have a minute, Your Honor, to confer?

THE COURT: Yes.

(Pause.)

MS. MORENO: Your Honor, just very briefly, on behalf of any other inducements that Dr. Al-Arian considered in return for accepting this plea, we just want to bring it to the Court's attention and highlight the deportation issue.

We have been in conversation with the Government quite materially about their efforts to expedite Dr. Al-Arian's

deportation. We are mindful of the other example of the Co-Defendant in this matter and the problems that have occurred there. We believe the Government has exercised a lot of good faith and told us that they would do everything they can to assist us in expediting this and, in fact, has shared information with Mr. Fernandez and Mr. Fugate about the deportation.

So, I just want to make it clear to the Court that inducement in this particular agreement was the expedited deportation and the assistance of the United States Government in helping facilitate that as soon as possible.

THE COURT: Okay. Well, I think we've spoken briefly to that issue earlier; but let me say this: As I read the plea agreement, there's no guarantee of an expedited deportation; but what the Government has assured you is that they will make their best effort to try to induce ICE to expedite the proceedings.

Is that correct, for the Government?

MR. ZITEK: That's correct. What Miss Moreno is referring to is that process has already started, you know. So, we're talking about actually trying to implement that particular provision. We're not -- we don't want -- in order to expedite it, we can't wait. So, we – the agreement was written in that fashion, and we are trying to carry out our side of the bargain, and Dr. Al-Arian and the -- his attorneys are trying to carry out their side of it to see if we can actually make the deportation work in an expedited fashion.

THE COURT: Now, did -- let me go back and get you to answer my question rather than the lawyers. The question is: The ultimate determination by us has to be that your plea is being entered freely and voluntarily and with a understanding of the consequences.

One of the ways that we measure the voluntariness aspect is whether there are inducements, either appropriate or inappropriate. These written plea agreements set forth a number of inducements. My question to you is, beyond the discussions and the efforts that apparently are ongoing with

regards to deportation, have there been any other promises made to you that are an inducement in your mind to you entering a guilty plea? If so, we need to put them on the record.

THE DEFENDANT: I don't recall anything else.

THE COURT: Okay. And you understand the status of the deportation issue? I think in the law "expedited" is a relative term. And it may not be tomorrow. As you've seen in the case of Mr. Hammoudeh, it may be a matter months.

What I hear is that the Government and your counsel are working to avoid a similar circumstance, and they hope that the -- that will occur much more expeditiously at the conclusion of any sentence, but there are no guarantees inherent in that. Do you understand?

THE DEFENDANT: I understand.

THE COURT: Okay. Apart from -- apart from any promise, has anybody threatened you in any way or do you feel like you're being forced or coerced in any way into pleading guilty?

THE DEFENDANT: No.

THE COURT: You think anybody has attempted to trick you?

THE DEFENDANT: No.

THE COURT: Now, in the proceedings, you were previously represented by Mr. Moffitt and Miss Moreno. In the broad sense, do you have any complaints about anything either Mr. Moffitt or Miss Moreno did on your behalf?

THE DEFENDANT: Absolutely not.

THE COURT: We post-trial allowed Mr. Moffitt to be withdrawn from further proceedings in the matter. Miss Moreno has a pending motion, which we have deferred specifically because I thought it was in everyone's best interest, including yours, that she be allowed to participate in the plea-bargaining process.

As I indicated -- I want to say this on the record, and then I'm going to ask you a question. As I indicated in the

order allowing Mr. Moffitt to be withdrawn, although he asserted irreconcilable conflicts with Dr. Al-Arian, I found no evidence of that. I think while there may have been disagreements along the way, I don't think the conflicts were reconcilable at all.

I don't recall that Miss Moreno alleged irreconcilable conflicts in her motion, and I certainly have found no evidence of that.

Having said that, since the trial and since we have a pending motion to withdraw that I have deferred, do you have any complaints about anything she's done during the post-trial period?

THE DEFENDANT: Absolutely not.

THE COURT: Now, we've also, on two occasions during the course of this trial, imposed upon Mr. Fugate and Mr. Fernandez to assist the Court, and I want to inform both of them that the Court is -- and I speak for both Judge Moody and myself -- that we are exceedingly grateful for the assistance that you've brought to the Court. This was entirely voluntary on your part and without any form of compensation, and we're grateful for that assistance.

I think in the latter stages involving the plea discussions, the involvement was such -- and I probably need to ask Dr. Al-Arian. Even though we provided them sort of as a sounding board for you and to give you an independent view of things, I think Mr. Fernandez was active in the plea discussions. Do you have anything -- any complaints about anything either Mr. Fernandez or Fugate or any other lawyer with their firm has done?

THE DEFENDANT: I deeply appreciate their involvement.

THE COURT: I take that to be no as well?

THE DEFENDANT: I have no problems.

THE COURT: All right. Now, I'm going to ask the prosecutor to give me a factual basis to support the plea.

There is a lengthy factual basis. By my

understanding, the factual basis was negotiated at arm's length. I am required, however, to put a factual basis on the record; and so, you're going to have to permit us to place that factual basis on the record.

I'm going to ask you some follow-up questions about it, and I'm going to ask you after it's been stated whether or not you agree with it, whether there are any inaccuracies in it, or whether or not you wish to correct anything. Hopefully the answer to all of those is no or yes, you agree and there are no corrections; but this is a necessary part of the proceeding.

If the Government would give me a factual basis.

MR. ZITEK: Yes, Your Honor.

As set forth in Paragraph 9 and subparagraphs of the plea agreement:

A. During the period of the late 1980s and early to mid 1990s, Defendant Al-Arian was associated with several organizations, including the Palestinian Islamic Jihad.

Defendant Al-Arian knew that Co-Defendants Ramadan Abdullah Shallah, Bashir Musa Mohammed Nafi, and Mazen Al-Najjar were also associated with the Palestinian Islamic Jihad.

B. On or about January 23rd, 1995, President William Clinton issued Executive Order 12947, which declared a national emergency regarding grave acts of violence committed by foreign terrorists that disrupted the Middle East peace process.

Executive Order 12947 prohibited certain transactions, including the making or receiving of any contribution, funds, goods, or services to or for the benefit of organizations and individuals who are declared specially-designated terrorists.

Executive Order 12947 also made unlawful any transaction that evaded or avoided or had the purpose of evading or avoiding or attempting to violate any of the -- of the prohibitions set forth in the order.

On January 24th, 1995, the United States had designated the Palestinian Islamic Jihad, Sheikh Abdel Aziz Awda, and Fathi Shiqaqi as specially-designated terrorists. Later that year, in November 1995, the United States designated Ramadan Shallah as a specially-designated terrorist.

C. Defendant Al-Arian performed services for the Palestinian Islamic Jihad in 1995 and thereafter.

D. Such services included filing for immigration benefits for individuals associated with the Palestinian Islamic Jihad, hiding the identities of individuals associated with the Palestinian Islamic Jihad, providing assistance to an individual associated with the Palestinian Islamic Jihad in a United States court proceeding.

The services are described in more particularity in the following paragraphs.

E. On or about February 6th, 1995, Defendant Al-Arian had a telephone conversation with a co-conspirator and discussed a recent presidential executive order against terrorists.

F. Defendant Al-Arian was aware that the Palestinian Islamic Jihad achieved its objectives by, among other means, acts of violence.

G. On or about August 25th, 1995, Defendant Al-Arian filed a visa renewal petition with the INS on behalf of Co-Defendant Nafi.

H. On or about September 1st, 1995, Co-Defendant Al-Najjar wrote a $5,000 check drawn on the Muslim Women's Society account payable to the World & Islam Studies Enterprise known as WISE, which was deposited into the WISE account.

I. On or about October 25th, 1995, Co-Defendant Al-Najjar executed an affidavit filed with the INS in support of Nafi's alien employment petition. In the affidavit, Al-Najjar stated that he and Defendant Al-Arian had sufficient financial means to fund Nafi's salary. Al-Najjar

further stated in 1993 he contributed $36,000 to WISE; that in January and February 1994, he had in excess of $50,000 available to support the operations of WISE.

J. On or about October 30th, 1995, in the early morning hours, Defendant Al-Arian received a telephone call from a co-conspirator in which the co-conspirator asked whether Defendant Al-Arian had heard that Fathi Shiqaqi had been killed. Defendant Al-Arian indicated that he had heard, then refused to talk.

Later that day, he had a telephone conversation with Al-Najjar. Defendant Al-Arian indicated he wanted to meet with Al-Najjar.

K. On or about October 30th, 1995, Co-Defendant Nafi made a telephone call to Al-Arian. Nafi whispered during this conversation, and Defendant Al-Arian said the matter had been complicated and inquiries had begun.

L. On or about October 30th, 1995, Defendant Al-Arian had a telephone conversation with a journalist at the *St. Petersburg Times.* When the journalist asked about Shallah being named Secretary General of the Palestinian Islamic Jihad, Defendant Al-Arian falsely stated that Shallah's name must have been mixed up with someone else and falsely stated he only knew Ramadan Abdullah Shallah as "Ramadan Shallah."

Later, Defendant Al-Arian had another telephone conversation with a journalist at the *St. Petersburg Times.* During this conversation, Defendant Al-Arian expressed shock and surprise and falsely stated there was nothing Shallah had done while at WISE to indicate any political affiliation.

Defendant Al-Arian falsely indicated that Shallah was not involved in any political activities while at WISE and that Shallah had been engaged in only scholarly work.

M. On or about October 31, 1995, Defendant Al-Arian and Co-Defendant Al-Najjar caused a facsimile to be sent from WISE explaining his mission and his experience with

Shallah and falsely denied any knowledge or affiliation with any political group in the Middle East.

N. On or about August 7th, 2000, Defendant Al-Arian, within the Middle District of Florida, had a telephone conversation with Co-Defendant Nafi, who was in England, about utilizing a contact of Nafi in Egypt to obtain travel documents for Al-Najjar. They then spoke about Nafi's problems with his immigration status in the United States. They then had a coded conversation about the accounts to which Nafi had sent money to assist in the defense of Co-Defendant Al-Najjar's ongoing INS proceeding.

0. On or about August 8th, 2000, Defendant Al-Arian, who was in the Middle District of Florida, called a co-conspirator who was outside the state of Florida. When Defendant Al-Arian asked the co-conspirator if anything was deposited in his account or his wife's account, the co-conspirator replied that there were, quote, "ten shirts," unquote (referring to a sum of money). The Defendant Al-Arian then directed the co-conspirator to send nine of them to the account of another co-conspirator.

P. Later in the day on August 8th, 2000, Defendant Al-Arian, within the Middle District of Florida, had a telephone conversation with Co-Defendant Nafi, who was outside the state of Florida and told Nafi that the issue of the magazines (referring to a sum of money) was resolved, but the travel document had not been received from Egypt.

They then discussed utilizing the press to support Al-Najjar in his INS hearing by setting up an interview with Abed Aziz Awda to show that he had the permission of the Israelis to reside in the Gaza Strip. Defendant Al-Arian asked Nafi for Awda's telephone number. Nafi told him to call back the next day to get the number. Additionally, they discussed Nafi's response to allegations in the press that he was a member of the Palestinian Islamic Jihad.

Q. On or about August 8th, 2000, Defendant Al-Arian directed Co-Defendant Hatim Naji Fariz to arrange

a newspaper interview with Awda.

R. On or about August 9th, 2000, Defendant Al-Arian and Co-Defendant Fariz had a telephone conversation about causing one or more newspaper articles to be written on Awda. They desired to utilize those articles in the INS hearing regarding Al-Najjar and wanted to portray -- wanted them to portray Awda as a religious figure with no relation to the Palestinian Islamic Jihad.

THE COURT: Thank you, sir.

Dr. Al-Arian, is that an accurate statement of your involvement in the matters related to Count 4?

THE DEFENDANT: Yes, sir.

THE COURT: Do you wish to correct any -- any of the factual statement made by Mr. Zitek or add any additional facts?

THE DEFENDANT: No, sir.

THE COURT: If you look at the bottom of page 14, top of page 15, the concluding paragraphs of your plea agreement indicate that this is the entire agreement, as we have previously discussed; and then there is the last paragraph by which you certified that you read this plea agreement in its entirety and that you understand it. Is that, in fact, correct?

THE DEFENDANT: That's correct, Your Honor.

THE COURT: Okay. Is there anything about the plea agreement that I have said today that confuses you in any way or that you wish to question?

THE DEFENDANT: No, Your Honor.

THE COURT: The plea agreement is dated February 28th, 2006, and bears your signature, along with Miss Moreno's. Did you sign it after you read it?

THE DEFENDANT: Yes, I did.

THE COURT: I always pause at the end of the process to tell whoever I'm taking a plea from that it doesn't matter to me, nor does it matter to Judge Moody, whether you plead guilty to this allegation or not. We both

respect that you have an absolute right to have a trial in this case, a retrial if you wish. So, I always pause at the end of the process to say that if, while we have been talking, you have started to think that perhaps you ought not to plead but you ought to have your second trial, that's fine with us. All you have to do is tell me that, and I'll stop the plea, and we'll put you back on the trial calendar.

On the other hand, if you're satisfied you're guilty or you believe it's in your best interest to plead guilty and that's what you wish to do, let me know that, and I'll wrap up the plea as far as I can take it today.

Now, what would you like to do?

THE DEFENDANT: I believe it's in my best interest to enter a plea.

THE COURT: All right. I'm going to find that Sami Amin Al-Arian is an alert, intelligent individual. I'm satisfied from speaking with him today that he's fully coherent, that he understands the allegations against him in Count 4 of the superseding indictment, as well as the potential punishment on that count.

I have explained to him the constitutional rights he's giving up by entering his plea. I'm satisfied that he understands those rights as well and he is voluntarily waiving them.

There is a written plea agreement in this case. It appears to contain all the promises that have been made to Dr. Al-Arian. It does not appear that there are any inappropriate promises or inducements, nor does it appear that he has been threatened, forced, or coerced in any way into pleading guilty.

The plea is being entered in accordance with Rule 11(c)(1)(C). However, as previously indicated, Judge Moody has indicated his intention to accept the plea and allow the matter to move forward rather expeditiously for sentencing.

There is a factual basis to support the allegations in Count 4 of the superseding indictment. The Defendant agrees

with those facts. Throughout the proceedings, Dr. Al-Arian has been represented by competent counsel with whom he indicates he's satisfied. In addition, he's had the benefit of outside counsel as well.

From everything that appears to me today, sir, your plea is being entered freely and voluntarily with an understanding of the consequences. I'm going to so find and will recommend that this matter proceed forward with sentencing.

The way this works is that I will enter a -- I will enter a report and recommendation. There's a ten-day period for objections. At the conclusion of that ten days, if there are no objections filed, the plea will be accepted; and at that point, your case will be set for sentencing.

Do you understand?

THE DEFENDANT: I do.

THE COURT: Thank you.

Miss Moreno.

MS. MORENO: Your Honor, I have a comment and question very briefly. On behalf of Mr. Moffitt and myself, Your Honor, we would also like to express our deep appreciation to Mr. Fugate and Mr. Fernandez and to Simon. As this Court knows, after an arduous six months in trial, we immediately went into trying to resolve this matter.

We were dedicated to securing the release of Dr. Al-Arian in some fashion, and we believe that we could get to this place only with the assistance of these fine gentlemen in the finest traditions of being counseled to a situation. Mr. Fugate and Mr. Fernandez and Simon have really assisted us. So, we want to thank them for affording those efforts.

With respect to the report and recommendation, Your Honor, in reading the transcript, I had -- I was reminded that I had asked you that the R&R would be in camera to His Honor and that the sentencing, which I'm hearing from the Court, would be sometime after ten days

from today, I -- I'm assuming.

THE COURT: The plea will not be accepted before the ten-day objection period runs. Once it's accepted, I'm sure that Judge Moody will be in -- in contact with your office about sentencing. If you have -- if you have a preference on when sentencing occurs, feel free to contact his office.

MS. MORENO: And, Your Honor, we -- it was the request of the Defense at the previous proceeding on February the 27th, and it is still our request, that the sentencing be in camera as well. We can communicate that again to the Court. I did -- I did want --

THE COURT: Let me say this: If you read the entirety of the order yesterday from Judge Moody, he's indicated it will be a public proceeding, and I think appropriately so.

If you believe it should be in camera, then you should file a motion asking him to reconsider that; but he's already indicated that it should be a public proceeding.

MS. MORENO: I did not know about the order, Your Honor.

THE COURT: Well, there is a -- an order entered as of yesterday, and we can certainly give you a copy of it. But as he indicates at the end of the order, the sentencing proceeding will be in public but, pending the public sentencing on all of these matters, will, in fact, remain in camera; and any motions that you have related, for instance, to the -- if you have any motions related to the PSR or any motions related to sentencing, they should be filed in camera. However, at the point of sentencing, I expect these matters will be opened up.

MS. MORENO: The order that you're referring to was under seal, and I haven't gotten a copy of it. That's why I was not apprised that he had ordered it has to be –

THE COURT: We'll have a copy of that down here that you can review, it you wish.

MS. MORENO: Thank you.

THE COURT: Anything else from the Government?

MR. ZITEJ: Let me just check my notes here, Judge.

(Pause.) We have nothing further, Judge.

THE COURT: Anything else from the Defense?

MS. MORENO: No, Your Honor.

THE COURT: Good luck to you, sir.

(Adjourned at 2:10 p.m.)

CERITFICATE OF REPORTER

I. SHERILL LYNN JACKSON, Official Court Reporter for the United States District Court, Middle District of Florida, Tampa Division,

DO HEREBY CERTIFY, that I was authorized to and did, through use of Computer-Aided Transcription, report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages numbered 1 to 48, inclusive, constitute a true and correct transcription of my shorthance report of said proceedings and evidence.

IN WITNESS WHEROF I have hereunto set my hand this 17th day of April, 2006.

s/_____

SHERRILL LYNN JACKSON, RPR

Official Court Reporter

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. Case No. 8:03-cr-77-T-30TBM

SAMI AMIN AL-ARIAN

REPORT AND RECOMMENDATION CONCERNING PLEA OF GUILTY

The Defendant, by consent, has appeared before me pursuant to Rule 11(c)(1)(C) Fed. R. Crim. P. and Rule 6.01(c)(12), Middle District of Florida Local Rules, and has entered a plea of guilty to Count Four of the Superseding Indictment. After cautioning and examining the Defendant under oath concerning each of the subjects mentioned in Rule 11, I determined that the guilty plea was knowledgeable and voluntary and that the offenses charged are supported by an independent basis in fact as to each of the essential elements of such offense. If the court approves of the agreed disposition, I recommend that the plea of guilty be accepted and that the Defendant be adjudged guilty and have sentence imposed accordingly.

Date: April 14, 2006

s/
THOMAS B. McCOUN III
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Presiding District Judge
Courtroom Deputy: Sara Boswell
Terry Furr & Terry Zitek, Assistant United States Attorneys

United States Probation Office
Linda Moreno, Defense Attorney

NOTICE

Failure to file written objections to this Report and Recommendation within ten (10) days from the date of its service shall bar an aggrieved party from attacking such Report and Recommendation before the assigned United States District Judge. 28 U.S.C. Section 636(b)(1)(B), Rule 6.02 Middle District of Florida Local Rules.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:03-CR-77-T-30TBM

UNITED STATES OF AMERICA

-vs- 1 May 2006 8:48 a.m.

SAMI AMIN AL-ARIAN,
Defendants.

TRANSCRIPT OF PROCEEDINGS
(SENTENCING HEARING

**BEFORE THE HONORABLE JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE**

APPEARANCES:

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STENOGRAPHICALLY REPORTED
COMPUTER-AIDED TRANSCRIPTION

ALSO PRESENT: **SAMI AMIN AL-ARIAN (Defendant) KERRY MYERS (FBI Case Agent) CHARLOTTE BRAZIEL (FBI Agent) CHRIS GRIFFITHS (Paralegal –** U.S. Attorney's Office)
SARA BOSWELL
(Courtroom Deputy Clerk)
FRANK DOHERTY
(Court Security Officer)

REPORTED BY: SHERRILL LYNN JACKSON, RPR
Official Court Reporter
801 North Florida Avenue
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Tampa, Florida 33602
Phone: (813) 301-5041

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(8:48 a.m.) **PROCEEDINGS**

THE COURT: Sara, would you swear the Defendant.

(The Defendant was duly sworn/affirmed and responded as follows:)

THE DEFENDANT: I do.

THE CLERK: Thank you. Would you please state your name and spell your first and last name for the record.

THE DEFENDANT: Sami Amin Al-Arian, S-A-M-I A-M-I-N A-L-dash-A-R-I-A-N.

THE CLERK: Thank you.

THE COURT: Sami Al-Arian, you have now entered a plea of guilty to Count 4 of the superseding indictment charging you with conspiracy to make and receive contributions of funds, goods, or services to or for the benefit of specially designated terrorists in violation of Title 18, United States Code, Section 371. The Court hereby accepts your guilty plea and adjudges you guilty of that offense.

We've now reached the stage in the proceeding where it's my duty to address certain questions to you and your lawyer, as well as the lawyer for the Government. Have you had the opportunity to read and discuss the presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any objections to the factual accuracy of the report?

(Pause.)

THE DEFENDANT: Excuse me just one moment. (Pause.) No objection, sir.

THE COURT: Do you or your attorney wish to make any objections to the probation officer's application of the guidelines?

THE DEFENDANT: No.

THE COURT: There being no objections to either the factual statements or the application of the guidelines as contained in the presentence report, the Court adopts those statements and guideline applications as its findings of fact and determines that the applicable guidelines are Total Offense Level 23, Criminal History Category 1, which calls for imprisonment of 46 to 57 months, supervised release of two to three years, a fine of $10,000 to $100,000, and a $100 special assessment.

Do you know of any reason why the Court should not now proceed with imposition of a sentence?

MS. MORENO: Your Honor, I'm not familiar with the Court's protocol. I do have some comments I wish to make to the Court with respect to the sentencing factors in this matter.

THE COURT: All right.

First, do you know of any reason why the Court should not proceed with imposition of a sentence?

MS. MORENO: There is no reason.

THE COURT: Proceed.

MS. MORENO: Your Honor, I think the Court is very familiar with the holdings of the Booker case and its progeny. In this matter, there are certain issues that I would like to emphasize to the Court, not the least of which is the issue of deportation and how it should affect the sentencing.

In this matter, Your Honor, we believe and we argue to the Court that Booker allows Your Honor to go below the sentencing guidelines, and we would say to the Court that you should impose a sentence of time served in this matter. A sentence of time served for Dr. Al-Arian would effectuate a deportation.

In this case, the plea agreement provides for a stipulated judicial order of deportation or removal, and the ultimate aim here of the Government is to deport Dr. Al-Arian. To accomplish this end, the parties have agreed to work together.

Notably, Homeland Security has given us assurances that they will cut through the red tape to ensure that Dr. Al-Arian's removal is effectuated with all speed and will not obstruct or delay his departure. We are mindful of the disturbing events that have befallen Mr. Hammoudeh, and we have assurances from the Government that they will work to avoid that particular injustice for Dr. Al-Arian.

Extending Dr. Al-Arian's sentence any further, Your Honor, will serve to delay his inevitable deportation; and since we are not contesting that, the Government is spared further time and expense, and this should weigh in his favor.

Regarding the retributive aspects of sentencing, which is a factor that the Court must consider, we would submit that

Dr. Al-Arian has already paid a painful price, being incarcerated approximately 38 and a half months in this case already. During this uniquely punitive detention, two years of which was served at Coleman Federal Prison in the special housing unit, which was the unit, Your Honor, that was reserved for the convicted felons, the worst of the worst, the most violent, Dr. Al-Arian was not allowed to enjoy –

THE COURT: Let me stop you a minute. He was kept as a pretrial detainee. He and Mr. Hammoudeh were the only two people that were not convicted, and they were required to keep them separate from convicted felons; right?

MS. MORENO: Well, they were housed in the special housing unit, which is -- has only convicted felons, Your Honor; but they were in isolation.

THE COURT: There were no convicted felons kept with them in their unit; correct?

MS. MORENO: In their cell, that is correct.

THE COURT: All right, proceed.

MS. MORENO: In their cell, that's correct; but in the special housing unit, Your Honor, that was full of convicted felons, respectfully, and Dr. Al-Arian did not enjoy even the privileges that the violent offenders -- violent convicted offenders in that unit did enjoy.

He was not allowed to engage in Friday prayer services. He -- the clocks were covered so Dr. Al-Arian did not know what time it was so that he could pray. He was not allowed to eat the same food that the other members of the special housing unit were allowed to eat.

I bring this to the Court's attention because the Court can consider this in deciding a sentence.

He was not allowed contact visits, as the Court knows. The only visits he was allowed in a contact setting were with his attorneys. This -- this wreaked havoc on the family situation, Your Honor, and on his minor children, causing them further suffering; and imposing any greater sentence, we believe, does not promote the ends of justice.

The last time Dr. Al-Arian, besides the few times that the Court allowed a contact visit -- the last time Dr. Al-Arian put his children to bed was before the predawn raid February 20th, 2003.

Regarding restitution, Your Honor, in the Probation and Sentence Report, the Court has been informed that it is the position of the United States Government that this is a case that has no victims, that there are no individuals who were directly or proximately harmed as a result of this -- this particular offense; and, further, the United States is on record that this conviction is not a crime of violence, and restitution is not required or authorized. Indeed, even the probation officer did not recommend that restitution was warranted in this particular case.

We believe these are also factors that way mightily in favor of a time-served sentence.

Your Honor, with -- I won't go through the other particular factors, which are well detailed in the Probation and Sentencing Report -- and I'm specifically addressing my comments to the issue of the children -- but I would just like to end my comments by saying to Your Honor that Sami Al-Arian does not come before you to be sentenced today as an unknown person. He -- his life has been examined and

criticized, exaggerated, demonized, admired, and judged. People have denounced him, and people have prayed with him and for him.

We have heard from students, and I hope Your Honor has the letters that were sent by students and professors from around the world actually in support of the release of Dr. Al-Arian; and I would ask those letters to be made a part of the record. These students are students who learned from him and professors who admired him.

To close, Your Honor, there are three letters that I believe show the Court why the Court should impose a time-served sentence and allow Dr. Al-Arian to begin the next chapter of his life.

There is a poignant letter from his son, who was extolled in a birthday card right before the trial began to have faith and belief in the system to which his father was going to be subjected; and his son eloquently spoke of the tragedy and the havoc that was wreaked upon the family these last three years, especially the two minor children, which I think the Court has some understanding of, respectfully.

There was a professor, Your Honor – professor emeritus from the University of Maryland who wrote to the Court, a former visiting distinguished professor at the U.S. Military Academy at West Point and professor of National Security Studies at the U.S. Air Force Academy, who talked about Dr. Al-Arian's remarkable adult children and what a valued colleague Dr. Al-Arian was.

There was a letter from a renowned Jewish scholar from Hifah University --

THE COURT: You're asking for the letters to be made

a part of the record?

MS. MORENO: Yes, Your Honor.

THE COURT: Sara, would you put them as Defendant's Exhibit 1 and make them part of the record.

MS. MORENO: Finally, from Elan Pape from Hifah University, who sees Dr. Al-Arian as a voice for reconciliation between the people of Israel and Palestine: "The greatest tribute, Your Honor, that we can show the Court is his remarkable children and the successful and conscientious students."

For all these reasons, I ask the Court to impose a sentence of time served and for a judicial order of removal and deportation to be effectuated immediately.

Your Honor, Dr. Al-Arian would like to address the Court.

THE COURT: All right.

THE DEFENDANT: Thank you, Your Honor, for giving me this opportunity to address the Court.

First of all, I take full responsibility for the actions outlined in the plea agreement.

I thank my outstanding lawyer, Miss Moreno, for eloquently expressing my sentiments to the Court this morning. I also would like to thank her and my former attorney, Mr. Bill Moffitt, for their exceptional representation and tireless efforts on my behalf for the past three years.

I would like as well to thank Mr. Lee Fugate, Mr. Jack

Fernandez, and Mr. Simon Gaugush for their excellent efforts on my behalf the past few months.

This process, Your Honor, affirmed my belief in the true meaning of a democratic society in which the independence of the judiciary, the integrity of the jury system, and the system of checks and balances are upheld despite intense public and political pressure. Hence, I'd like to express my deep appreciation for the jury for their remarkable courage and efforts in the service of justice in this case.

It's also my belief that an impartial and conscientious jury, as well as principled judicial rulings that upheld the values of the Constitution, are the real vehicles that win the hearts and minds of people across the globe, especially in the Arab and Muslim world.

Your Honor, this May 21st will mark my thirty-first anniversary in the United States. The American chapter of my life has surely been the longest, but it's about to end, and I will soon leave and start a new chapter. As I leave, I harbor no bitterness or resentment.

Looking at three decades of my life in the – in America, I -- I am indeed grateful. I'm indeed grateful for the opportunities afforded the son of stateless Palestinian refugees in a foreign country while denied such opportunity in his country of origin and in the countries where he was born or raised.

I'm very grateful that my five wonderful children were born and raised in a country that afforded them and provided them with freedom and equal opportunities in order to reach their potential. Had they been born anywhere else, they would still be classified and treated as stateless Palestinian refugees.

During my many years in America, I tried to uphold the great values of my faith and culture and the honored ideals and principles of this society. I'm very proud of my contributions to this society, and I'm very grateful to have been able to contribute in many intervals.

I would like to thank my beloved family, my beloved wife and children, who I'm hoping to join with soon. Their continuous love and overwhelming support during this ordeal have been ceaseless and inspiring. During this entire time, my family never lost faith in the ideals of truth and justice that our society holds in esteem.

Finally and most importantly, Your Honor, I thank the Almighty for bestowing on me deep faith and calming peace that have -- that have sustained me during these few years.

Thank you, Your Honor.

THE COURT: Anything from the Government?
MR. PEREZ: Yes, sir.

Good morning, Your Honor. As you know, the Government made certain recommendations in the plea agreement. The Government recommends that the Defendant receive a sentence at the low end of the guideline range that Your Honor has already alluded to in going through the sentencing guidelines.

To the extent that Miss Moreno is asking for time -- a time-served sentence -- and that range would be under 46 -- that would not be part of the agreed-to plea agreement, the 11C1(c) agreement that we entered into with the Defendant.

We also recommended in the plea agreement – or stated that we would defer to the Bureau of Prisons to

designate the appropriate facility for Mr. Al-Arian to complete his sentence.

We also made no recommendation as to the imposition of a fine, and we do ask that the Immigration and Customs Enforcement Service expedite execution of a judicial deportation order that will be entered by this Court. This plea agreement is in the best interest of the United States because the objection -- the objective, excuse me, of this prosecution was to expose Mr. Al-Arian and other members of the PIJ in the United States and bring them to justice by making them accountable for the crimes they committed on behalf of the PIJ.

Following the trial, we had to weigh our litigative risks, the cost of another prosecution, the tying-up of judicial resources, and the burden that it placed on victims and witnesses. After due consideration of those factors, we entered into this plea agreement with the Defendant. We now ask the Court, who has already accepted the plea, to sentence him according to the terms in the plea agreement.

Thank you, Your Honor.

THE COURT: Dr. Al-Arian, as usual, you speak very eloquently. I find it interesting that here in public in front of everyone you praised this country, the same country that in private you referred to as "the great Satan." But that's just evidence of how you operate in the face of your friends and neighbors.

You are a master manipulator. You looked your neighbors in the eyes and said you had nothing to do with the Palestinian Islamic Jihad. This trial exposed that as a lie.

Your back-up claim is that your efforts were only to provide charities for widows and orphans. That, too, is a lie.

The evidence was clear in this case that you were a leader of the Palestinian Islamic Jihad. You were on the board of directors and an officer, the secretary. Directors control the actions of an organization, even the PIJ; and you were an active leader.

When Iran, the major funding source of the PIJ, became upset because the PIJ could not account for how it was spending its money, it was to your board of directors that it went to demand changes. Iran wanted its representative to have a say in how its money was spent.

To stop that, you leaped into action. You offered to rewrite the bylaws of the organization. You proposed that all PIJ funds be controlled by a three-person committee, of which you would be one of the three. You made calls to fellow directors all over the world to gather support. This committee would account for Iran's money, all to keep the money flowing.

But when it came to blowing up women and children on buses, did you leap into action then? Did you offer to form a committee to protect the innocent? Did you call your fellow directors and enlist their aid in stopping the bombing or even to stop the targeting of the innocent? No. You lifted not one finger, made not one phone call. To the contrary, you laughed when you heard about the bombings, what you euphemistically call "operations." You even pleaded for donations to pay for more such operations.

I'll give a specific example: On January 22nd, 1995, in Beit Lid, there was a double suicide bombing claimed by the PIJ. The bombings occurred at a busy bus transfer station. People, including women and children, were milling about waiting for their buses.

When one pulled up -- not a particular bus, a random bus -- the first bomb was detonated, killing passengers and bystanders alike. The second bomber waited ten minutes or so and blew up the ambulance crews and other bystanders who had rushed in to help the wounded and dying.

Anyone with even the slightest bit of human compassion would be sickened. Not you. You saw it as an opportunity to solicit more money to carry out more bombings.

You composed a letter to a member of the Kuwait legislature. Your true attitude is best described by your own words, and I quote: "The latest operation carried out by the two mujahideen who were martyred for the sake of God is the best guide and witness to what the believing few can do in the face of Arab and Islamic collapse at the heels of the Zionist enemy and in keeping the flame of faith, steadfastness, and defiance glowing. I call upon you to try to extend true support of the jihad effort in Palestine so that operations such as these can continue."

And yet, still in the face of your own words, you continue to lie to your friends and supporters, claiming to abhor violence and to seek only aid for widows and orphans.

Your only connection to widows and orphans is that you create them, even among the Palestinians; and you create them, not by sending your children to blow themselves out of existence. No. You exhort others to send their children.

Your children attend the finest universities this country has to offer while you raise money to blow up the children of others.

You are indeed a master manipulator.

The Court has asked the Defendant why judgment should not now be pronounced and has heard no cause to the contrary, and the Defendant and his attorney having made a statement on his behalf and the Court having considered the factors in 18 U.S.C., Section 3553, and the Sentencing Reform Act of 1984 and the advisory guidelines and the plea agreement entered into between the parties, it is the judgment of the Court that the Defendant, Sami Amin Al-Arian, is hereby committed to the custody of the Bureau of Prisons, to be imprisoned for a term of 57 months.

That's the maximum under the guidelines without me exceeding the guidelines, Dr. Al-Arian.

Upon release from imprisonment, the Defendant shall serve a three-year term of supervised release. While on supervised release, the Defendant shall comply with the standard conditions adopted by the Court in the Middle District of Florida.

If the Defendant is deported, he shall not reenter the United States without the express permission of the appropriate governmental authority.

The Defendant shall cooperate in the collection of DNA as directed by the probation officer.

The mandatory drug-testing requirements of the Violent Crime Control Act are waived. However, the Court authorizes random drug-testing, not to exceed 104 tests per year.

Based on the financial status of the Defendant, the Court waives imposition of a fine.

It is ordered that the Defendant pay to the United

States a special assessment of $100, which shall be due immediately.

The Court finds that the sentence imposed is sufficient but not greater than necessary to comply with the statutory purposes of sentencing.

The sentence is within the guideline range. That range does not exceed 24 months, and the Court finds that it will not depart from the sentence called for by the application of the guidelines.

The Court has accepted the plea agreement because it is satisfied that the agreement adequately reflects the seriousness of the actual offense behavior and that accepting the plea agreement will not undermine the statutory purposes of sentencing.

Under the plea agreement, the Defendant has entered a guilty plea to Count 4 in return for the dismissal of Counts 1, 3, 7, 9, 38, 39, 40, and 44. Therefore, in accordance with the plea agreement, it is ordered that Counts 1, 3, 7, 9, 38, 39, 40, and 44 of the superseding indictment be dismissed as to this Defendant. Furthermore, it is ordered that the underlying indictment be dismissed as to this Defendant.

In accordance with the plea agreement of the parties, the Court orders deportation.

The Court having pronounced sentence, does counsel for the Defendant or the Government have any objections to the sentence or to the manner in which the Court pronounced sentence other than those previously stated for the record?

MR. MOFFITT: No, Your Honor.

MR. FURR: No, Your Honor.

THE COURT: The Defendant is hereby remanded to the custody of the United States Marshal to await designation by the Bureau of Prisons.

To the extent permitted by your plea agreement, you have the right of appeal from the judgment and sentence within ten days from this date. Failure to appeal within the ten-day period shall be a waiver of your right to appeal. The Government also has a right to appeal from this sentence.

You're advised that you're entitled to the assistance of a lawyer in taking an appeal; and if you're unable to afford a lawyer, one will be provided for you. If you're unable to afford the filing fee, the Clerk will be directed to accept the notice of appeal without such fee.

MS. MORENO: Your Honor, does the Court state the credit that Dr. Al-Arian would receive in terms of his continuous incarceration from February 20th, 2003, or does the Court need all of that calculation?

THE COURT: The calculation is made by the Bureau of Prisons, but he will receive credit for the time that he served so far.

MS. MORENO: Thank you.

THE COURT: Anything further?

MR. FURR: No, sir.

THE COURT: All right, we're adjourned.

COURT SECURITY OFFICER: Court's in recess.

(Adjourned at 9:16 a.m.)

CERTIFICATE OR REPORTER

I, SHERRILL LYNN JACKSON, Official Court Reporter for the United States District Court, Middle District of Florida, Tampa Division,

DO HEREBY CERTIFY, that I was authorized to and did, through use of Computer-Aided Transcription, report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages numbered 1 to 21, inclusive, constitute a true and correct transcription of my shorthand report of said proceedings and evidence.

IN WITNESS WHEREOF I have hereunto set my hand this 9th day of June, 2006.

SHERRILL LYNN JACKSON, RPR
Official Court Reporter

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA **JUDGMENT IN A CRIMINAL CASE**

CASE NUMBER: 8:03-cr-77-T-30TBM

VS. USM NUMBER: 40939-018

SAMI AMIN AL-ARIAN
Defendant's Attorney: Linda Moreno, ret.

THE DEFENDANT:

X pleaded guilty to count(s) FOUR of the Superseding Indictment.

__ pleaded *nolo contendere* to count(s) which was accepted by the court.

__ was found guilty on count(s) after a plea of not guilty.

TITLE & SECTION	NATURE OF OFFENSE
18 U.S.C. § 371	Conspiracy to Make and Receive Contributions of Funds, Goods, or Services to or for the Benefit of Specially Designated Terrorists
OFFENSE ENDED	COUNT
September 21. 2004	Four

The defendant is sentenced as provided in pages *2* through 6 of this judgment. The sentence is imposed pursuant *to* the Sentencing Reform Act of 1984.

__ The defendant has been found not guilty on count(s)

X Count(s) ONE, THREE, SEVEN, NINE, THIRTY-EIGHT, THIRTY-NINE, FORTY, AND FORTY-FOUR of the Superseding Indictment and the counts in the underlying indictment are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in economic circumstances.

Date of Imposition of Sentence: May I. 2006

s/
JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

DATE: May 1, 2006

IMPRISONMENT

After considering the advisory sentencing guidelines and all of the factors identified in Title 18 U.S.C. §§ 3553(a)(1)-(7). the court finds that the sentence imposed is sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing.

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of FIFTY-SEVEN (57) MONTHS as to Count Four of the Superseding Indictment. The defendant will be given credit for time previously served.

X The court makes the following recommendations to the Bureau of Prisons: The defendant shall be placed at FCI Coleman (Florida), if possible.

X The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district.

_ at___a.m./p.m. on _ .

_ as notified by the United States Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

_ before 2 p.m. on ___.

_ as notified by the United States Marshal.

_ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ , to _____ , at ___ _____ with a certified copy of this judgment.

_____

United States Marshall

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS as to Count Four of the Superseding Indictment.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime. The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk

of future substance abuse. However, the Court authorizes the probation officer to conduct random drug testing not to exceed 104 tests per year.

X The defendant, having been convicted of a qualifying felony, shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia

related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

X If the defendant be deported, he shall not be allowed to re-enter the United States without the express permission of the appropriate governmental authority.*

X The mandatory drug testing provisions pursuant to the Violent Crime Control Act are waived. However, the

Court authorizes the probation officer to conduct random drug testing not to exceed 104 tests per year.

*The Court has entered a Judicial Order of Removal (Dkt. 1573) and hereby incorporates the order to this judgment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Total Restitution
Totals:	$100.00	Waived	N/A

___ The determination of restitution is deferred until ___. *An Amended Judgment in a Criminal Case* (A0-245C) will be entered after such determination.

___ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before ate United States.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order Percentage of Payment
Totals:	$ _____	$ _____	

___ Restitution amou dered pursuant to plea agreement
$ _____

___ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. 3612(1). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

___ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

___ the interest requirement is waived for the fine ___ restitution.

___ the interest requirement for the ___ fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 1 13A of Title 18 for the offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. X Lump sum payment of $ 100.00 due immediately, balance due

__not later than___, or

___ in accordance __C. __D, __E or ___F below: or

B. __ Payment to begin immediately (may be combined with__C. __D, __E or __F below); or

C. __ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of

$ _____ over a period of _____ (e.g., months or years),

to commence _____ days (e.g., 30 or 60 days) after the date of this judgment: or

D. __ Payment in equal _____ (e.g., weekly, monthly. quarterly) installments of $

over a period of _____ . (e.g., months or years) to commence _____ (e.g. 30 or 60 days) after release from imprisonment to a term of supervision; or

E. Payment during the term of supervised release will commence within 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time. or

F. Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

__ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee. if appropriate:

___ The defendant shall pay the cost of prosecution.
___ The defendant shall pay the following court cost(s):
___ The defendant shall forfeit the defendant's interest in the following property to the United States:

The Court orders that the defendant forfeit to the United States immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture, which are in the possession or control of the defendant or the defendant's nominees.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO.: 8:03-CR-77-T-30-TBM

SAMI AMIN AL-ARIAN

JUDICIAL ORDER OF REMOVAL

This cause comes before the Court upon the oral motion of the United States for entry of a judicial order of removal for defendant Sami Amin Al-Arian, pursuant to 8 U.S.C. § 1228(c)(5). The Court, having considered the motion and having heard the arguments of counsel on May 1, 2006, finds that the motion should be granted.

It is therefore ORDERED AND ADJUDGED that United States' motion for a judicial order of removal for defendant Sami Amin Al-Arian is GRANTED. The defendant is hereby ordered removed from the United States pursuant to the terms of his plea agreement, as accepted by the Court on April 17, 2006 (Dkt. #1566).

DONE and ORDERED in Tampa, Florida on 1 May, 2006.

s/
JAMES S. MOODY, JR.
United States District Judge

Copies furnished to:
Cousel/Parties of Record

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 06-12761-F

UNITED STATES OF AMERICA

versus

SAMI AMIN AL-ARIAN,
Defendant/Appellant.

BRIEF OF
APPELLANT SAMI AMIN AL-ARIAN

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
(CASE NO.: 8:03-CR-77-T)

PROFESSOR C. PETER ERLINDER
William Mitchell College of Law
875 Summit Avenue
Saint Paul MN 55105
Tel.: (651) 290-6384

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Civil Procedure 26.1 and 11th Circuit Rule 26. 1, appellants certify that this is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this appeal:

Dr. Sami al-Arian (appellant)

United States of America (appellee and victim)

Taha Jabir al-Alwani

Muhammed Tasir Hassan al-Khatib

Mazen al-Najjar

Ghassan Zayed Ballut

Jeffrey G. Brown

Alexis L. Collins

Daniel W. Eckhart

Hatem Naji Fariz

Walter E. Furr

Sameeh Taha Hammoudeh

Karin Hoppman

Cherie L. Krigsman

Franklyn Louderback
Nicholas M. Matassini

The Honorable Thomas B. McCoun, Magistrate Judge
Nicholas Moffitt

The Honorable James J. Moody

Linda Moreno

Bashir Musa Mohammed Nafi

Ramadan Abdullah Shallah

Terry Zitek

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. Oral argument would help explain the position of Appellant Sami Amin al-Arian and, respectfully, would assist the Court.

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Trial absolutely prohibits a sentencing Court from considering facts not found by the jury, if the sentence exceeds the statutory maximum authorized by Congress, and implies that the sentencing Court may never rely upon acquitted conduct that has been affirmatively rejected by the Jury, as discussed by the concurrence in *United States v. Faust*, 05-11329 (11th Cir. July 21, 2006), by a Panel of this Circuit.

II. After *Booker*, a sentencing Court cannot "reasonably" rely on acquitted conduct, and/or unproved allegations of criminal conduct following a mistrial, when such conduct and allegations are not supported by the Pre-sentence Report or the terms of the Plea Agreement, itself, in rejecting the sentence recommended by the Department of Justice.

III. When the sentencing Court rejects the recommendation of the Justice Department by relying on such acquitted facts and unproven, unsupported allegations of alleged conduct, the Court creates the "appearance of bias" prohibited by the Supreme Court of the United States in *Liteky v. United States*, 510 U.S. 540, 555 114, S.Ct. 1147 (1994), thus requiring resentencing and recusal of the sentencing Court.

IV. Due Process requires that sentencing, no less than the trial itself, requires an absence of actual bias and must prevent even the probability of unfairness, thus `justice must satisfy the appearance of justice' as required by the Supreme Court of the United States in *Estes v. Texas,* 381 U.S. 532, 542-43, 85 S.Ct. 1628 and *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11 (1954).

V. Under *Bordenkircher v. Hayes,* 434 U.S. 357, 98 S.Ct. 663 (1978), *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971) and their progeny, effective plea bargaining is an essential element of the criminal justice system, which

cannot survive rejection of Department of Justice recommended sentences based on acquitted conduct after *Booker*, and which is not otherwise supported in any submissions before the Court.

VI. A sentenced imposed by the Court which is double that recommended by the Justice Department and based on acquitted conduct, which is not otherwise supported by facts in the record, raises a Presumption of Judicial Vindictiveness by apparently punishing the Defendant for having exercised the Sixth Amendment right to a Jury trial, under *North Carolina v. Pearce*, 395 U.S. 711 (1969) and its progeny.

VII. The sentence imposed was unreasonable in light of the issues discussed above and in that it denigrates both the verdict and judgment of the jury and the evaluation and considered judgment of the Government of the United States.

CONCLUSION

TABLE OF AUTHORITIES

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STATEMENT OF JURISDICTION

This is an appeal from a May 1, 2006, plea of guilty in the district court. The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 as Appellant was charged with violating the laws of the United States. The Appellant filed a timely notice of appeal. (Doc. 1577). This Court has jurisdiction over the appeal pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES:

I. *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738 (2005) establishes that the Sixth Amendment right to a Jury Trial absolutely prohibits a sentencing Court from considering facts not found by the jury, if the sentence exceeds the statutory maximum authorized by Congress, and implies that the sentencing Court may never rely upon acquitted conduct that has been affirmatively *rejected* by the Jury, as discussed by Judge Barkett in *United States v. Faust,* 05-11329, 2006 WL 2035467 (11th Cir. July 21, 2006).

II. *After Booker*, a sentencing Court cannot "reasonably" rely on acquitted conduct, and/or unproved allegations not supported by: the Pre-sentence Report; the terms of the Plea Agreement; or, admissions by the Defendant, to reject a sentence recommended by the Department of Justice.

III. When the sentencing Court rejects the recommendation of the Justice Department by relying on such acquitted facts and unproven, unsupported allegations of alleged conduct, the

Court creates the "appearance of bias" prohibited by the Supreme Court of the United States in *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994), thus requiring resentencing and recusal of the sentencing Court.

IV. Due Process requires that sentencing, no less than the trial itself, requires an absence of actual bias and must prevent even the probability of unfairness, thus `justice must satisfy the appearance of justice' as required by the Supreme Court of the United States in *Estes v. Texas*, 381 U.S. 532, 542-43, 85 S.Ct. 1628, 1632-1633 and *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954).

V. Under *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663 (1978), *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971) and their progeny, effective plea bargaining is an essential element of the criminal justice system, which cannot survive rejection of Department of Justice recommended sentences based on acquitted conduct after *Booker*, and which is not otherwise supported in any submissions before the Court.

VI. A sentence imposed by the Court which is double that recommended by the Justice Department and based on acquitted conduct, which is not otherwise supported by facts in the record, raises a Presumption of Judicial Vindictiveness by apparently punishing the Defendant for having exercised the Sixth Amendment right to a Jury trial, under *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969) and its progeny.

VII. The sentence imposed was unreasonable in light of the issues discussed above and in that it denigrates both the verdict and judgment of the jury and the evaluation and considered judgment of the Government of the United States.

STATEMENT OF CASE AND FACTS

The Case

Following a six-month trial involving a multiple-count indictment, which included allegations of. violent conduct; material support for an organization declared forbidden by the Executive Branch; and, related conspiracy counts, the jury found Dr. al-Arian not guilty on 8 of the 17 counts with which he was charged, and failed to reach a verdict on the remaining offenses by a 10-2 margin, favoring acquittal[1]

Reliance by the Court on conduct *rejected* by a jury acquittal was used by the sentencing Court to impose a sentence nearly one year more than that recommended by the United States Attorney pursuant to a Plea Agreement, in which violence and the existence of human victims was specifically rejected BY the Justice Department, and which not based upon other background information revealed in the Pre-Sentence Report, violates the Appellant's Sixth Amendment right to have facts determined by the jury, as set out in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738 (2005), and as applied by a Panel of this Circuit *United States v. Faust*, 05-11329, 2006 WL 2035467 (July 21, 2006).

Faust is the first post-*Booker* case to clearly address the issue in this Circuit, thus requiring that Appellant be re-sentenced solely upon: (a) facts properly in the record that were found by a Jury and (b) the background of the accused as revealed in the Pre-Sentence Report or admitted pursuant to the Plea Agreement.

The Facts

Dr. Sami al-Arian was arrested on Feb. 22, 2003

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[1] Judgment of Acquittal, R. 1502, ¶ 1.

following an Indictment announced by former United States Attorney John Ashcroft at famous press conference from Moscow. At that time, Mr. Ashcroft announced to the world that Dr. al-Arian, "play[ed] a substantial role in international terrorism.[2]

The District Court properly found that the original Indictment was vague and overbroad in violation of the several provisions of the Constitution of the United States. *United States v. al Arian*, 308 Fed.Supp.2d 1322 (M.D. Fla. 2004). A superseding Indictment, which purported to correct the Constitutional errors in the original and the case proceeded on the new Indictment.

For more than three years, ending in July 2006 when he was transferred to a medium security facility, Dr. al-Arian was held, both during pre-trial and trial, in solitary confinement in the Special Handing Unit [SHU] of the Bureau of Prisons and in special, extremely restrictive conditions at the county facility. These extraordinarily oppressive pre-trial confinement conditions were imposed, although this was a first offense and Appellant had presented none of the security or behavioral problems which usually result in a SHU placement *following* conviction and no evidence of violent conduct by Dr. al-Arian prior to Indictment presented in the bail hearing.

On December 6, 2005, the jury unanimously rejected the following Counts in the Indictment, and the conduct relating thereto:
Count Two, Conspiracy to Murder or Maim Persons at Places Outside the United States, in violation of 18 U.S.C. §

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[2] Department of Justice Press Release: Members of the Palestinian Islamic Jihad Arrested, Feb. 20, 2003, http://usdoj.gov/opa/pr/2003/February/03_crm-099.htm

956(a)(1);

Count Eight, Use of the Mail or Any Facility in Interstate or Foreign Commerce, in violation of 18 U.S.C. § 1952(a)(2) and (3) and 18 U.S.C. § 2;

Count Seventeen, Use of the Mail or Any Facility in Interstate or Foreign Commerce, in violation of 18 U.S.C. § 1952(a)(2) and (3) and 18 U.S.C. § 2;

Count Twenty-Seven, Providing Material Support to a Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 233913(a)(1) and 18 U.S.C. § 2;

Count Twenty-Eight, Providing Material Support to a Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 233913(a)(1) and 18 U.S.C. § 2;

Count Twenty-Nine, Providing Material Support to a Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 233913(a)(1) and 18 U.S.C. § 2;

Count Forty-Six, Obstruction of Justice, in violation of; 18 U.S.C. § 1505;

Count Fifty-Three, Obstruction of Justice, in violation of 18 U.S.C. § 1503 and 18 U.S.C. §2.

The jury could not reach a verdict on the following Counts and conduct related thereto:

Count One, Conspiracy to Conduct or to Participate in the Conduct of an Enterprise through a Pattern of Racketeering Activity, in violation of 18 U.S.C. § 1962(d);

Count Three, Conspiracy to Provide Material Support to a

Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 233913;

Count Four, Conspiracy to Make and Receive Contributions of Funds, Goods, or Services to, or for the Benefit of Specially Designated Terrorists, in violation of 18 U.S.C. § 371;

Count Seven, Use of the Mail or Any Facility in Interstate or Foreign Commerce, in violation of 18 U.S.C. § 1952(a)(2) and (3) and18 U.S.C. § 2;

Count Nine, Use of the Mail or Any Facility in Interstate or Foreign Commerce, in violation of 18 U.S.C. § 1952(a)(2) and (3) and 18 U.S.C. § 2;

Count Thirty-Eight, Money Laundering, in violation of 18 U.S.C. § 1956(a)(2)(A);

Count Thirty-Nine, Money Laundering, in violation of 18 U.S.C. § 1956(a)(2)(A);

Count Forty, Money Laundering, in violation of 18 U.S.C. § 1956(a)(2)(A);

Count Forty-Four, Attempt to Procure Citizenship or Naturalization Unlawfully, in violation of 18 U.S.C. § 1425(a).

Despite the acquittal by the jury and the absence of any factual finding by the jury at all, regarding the conduct associated with the remaining Counts which might have been at issue on re-trial, the sentencing Court imposed a sentence based squarely upon the conduct which was rejected by the jury in the acquitted Counts and/or on facts that had not been decided by the jury. The sentence imposed by the Court was

at the top of the guidelines for a non-violent first offense and was contrary to the recommendation of the United States Attorney. The jury verdict, the statement of the United States Attorney memorialized in the plea agreement, and the pre-sentence report all made clear that there was no evidence of violence, there were no victims and there was no evidence of material support for a forbidden organization. All of which were cited by the Court in rejecting the recommendation of the United States Justice Department.

In his statements at the sentencing hearing, Judge Moody repeatedly referred to, and implicated Appellant in, alleged acts of violence and terrorism for which Appellant had been acquitted by the Jury. (*See, generally*, Transcript of Sentencing Hearing, R. 1594, Appellant's Appendix 4, pp. 14-19). Judge Moody described one specific incident in detail and then castigated Appellant, saying:

"[a]nyone with even the slightest bit of human compassion would be sickened. Not you. You saw it as an opportunity to solicit more money to carry out more bombings." (Transcript of Sentencing Hearing, p. 16, appellant's Appendix 4).

Judge Moody's reference to Appellant's intent, motive and plan for remittance directly contradicted the Jury's findings, which exculpated Dr. Al-Arian from any connection to any alleged acts of violence, as well as the Plea Agreement and Pre-Sentence Report which contained no admission of connection to violent acts. (*See, generally*, Plea Agreement, R. 1563, Appellant's Appendix 6).

Had the sentencing Court used the same basis for enhancing the sentence to 60 months and one day, which would be one day over the Congressionally authorized sentence, rather than the 57 months which the Guidelines

recommend, the sentence imposed would be in direct violation of United States v. Booker and subject to summary reversal. The question before the Court is whether the sentencing Court may violate the spirit of Booker by rejecting the Justice Department's recommendation pursuant to a plea agreement to enhance a sentence within the maximum authorized by Congress, by relying on facts rejected by the jury as acquitted conduct.[3]

SUMMARY OF ARGUMENT

I. United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005) establishes that the Sixth Amendment right to a Jury Trial absolutely prohibits a sentencing Court from considering facts not found by the jury, if the sentence exceeds the statutory maximum authorized by Congress, and implies that the sentencing Court may never rely upon acquitted conduct that has been affirmatively rejected by the Jury, as discussed by United States v. Faust, 05-11329, 2006 WL 2035467 (11th Cir. July 21, 2006), by a Panel of this Circuit.

II. After Booker, a sentencing Court cannot "reasonably" rely on acquitted conduct, and/or unproved allegations not supported by: the Pre-sentence Report; the terms of the Plea Agreement; or, admissions by the Defendant, to reject a sentence recommended by the Department of Justice.

III. When the sentencing Court rejects the

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[3] The increased sentence prevented the agreed-upon deportation, Dr. alArian's travel documents have expired and there is no certainty that said documents will be available in April, 2007, and indefinite immigration detention cannot be ruled out.

recommendation of the Justice Department by relying on such acquitted facts and unproven, unsupported allegations of alleged conduct, the Court creates the "appearance of bias" prohibited by the Supreme Court of the United States in Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994), thus requiring resentencing and recusal of the sentencing Court.

IV. Due Process requires that sentencing, no less than the trial itself, requires an absence of actual bias and must prevent even the probability of unfairness, thus `justice must satisfy the appearance of justice' as required by the Supreme Court of the United States in *Estes v. Texas*, 381 U.S. 532, 542-43, 85 S.Ct. 1628 and *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954).

V. Under *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663 (1978), *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971) and their progeny, effective plea bargaining is an essential element of the criminal justice system, which cannot survive rejection of Department of Justice recommended sentences based on acquitted conduct after *Booker*, and which is not otherwise supported in any submissions before the Court.

VI. A sentence imposed by the Court which is double that recommended by the Justice Department and based on acquitted conduct, which is not otherwise supported by facts in the record, raises a Presumption of Judicial Vindictiveness by apparently punishing the Defendant for having exercised the Sixth Amendment right to a Jury trial, under *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969) and its progeny.

VII. The sentence imposed was unreasonable in light of the issues discussed above and in that it denigrates both the

verdict and judgment of the jury and the evaluation and considered judgment of the Government of the United States.

ARGUMENT

Standard of Review is *de novo* regarding the use to which acquitted conduct might properly be put by the sentencing Court pursuant to a plea of guilty to a lesser offense following a partial acquittal at trial.

Standard of Review is abuse of discretion regarding the particular use of acquitted conduct by the sentencing Court in this matter.

I. *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738 (2005) establishes that the Sixth Amendment right to a Jury Trial absolutely prohibits a sentencing Court from considering facts not found by the jury, if the sentence exceeds the statutory maximum authorized by Congress, and implies that the sentencing Court may *never* rely upon acquitted conduct that has been affirmatively *rejected* by the Jury, as discussed by the Judge Barkett in United States v. Faust, 05-11329 (11th Cir. July 21, 2006).

As this Court is well aware, the *Booker* opinion has required a complete re-evaluation of all of the previous precedent regarding the relationship between the Sixth Amendment right to a Jury Trial, and the discretion that may properly be exercised by the sentencing Court. For example, in the *instant* case, the sentencing Court was completely foreclosed from basing any sentence beyond the 60 month maximum imposed by Congress on facts not specifically determined by a jury verdict based on the "beyond a reasonable doubt" standard.

The reasoning of the Court in *Booker* adopted by seven

of the current members of the Court , across ideological lines, recognizes the centrality of the Sixth Amendment right to a Jury Trial in the American constitutional system:

> "It has been settled throughout our history that the Constitution protects every criminal defendant `against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is equally clear that the `Constitution gives a criminal defendant the right to demand that jury find him guilty of all the elements of the crime with which he is charged.'"
>
> *United States v. Gaudin*, 515 U.S. 506, 511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

However, the proper role in sentencing of acquitted conduct that has been affirmatively rejected by the jury, which at issue in the case before the Court, was not specifically addressed in *Booker*. In the context of sentencing pursuant to plea agreement following a partial acquittal, *Booker* is also silent on the proper use to which acquitted conduct and facts not found by a jury verdict or admitted by the defendant, may be put. Although not specifically discussed in Booker, the logic of the Majority opinion compels the conclusion that, when a defendant has exercised the Sixth Amendment right to a Jury trial, the sentencing Court may *never* rely on facts specifically rejected by the Jury in imposing its sentence ... if the Sixth Amendment is to retain the new vitality in its application that Booker requires.

This is precisely the question addressed by a Panel of this Court in *United States v. Faust*, No. 05-1139, 2006 WL 2035467 (July 21, 2006), a case in which a defendant was

found not guilty of several drug counts, but was convicted of a single count by jury verdict. At sentencing the trial court cited the facts underlying the *acquitted* counts as a basis for imposing the sentence for the remaining count of which the defendant was convicted. The majority recognized that *Booker* imposes a "reasonableness" standard regarding the factors which may be considered by the Court which, of course, is the aspect of *Booker* that converted the entire Federal Sentencing Guidelines scheme from mandatory to mere recommendations regarding the exercise of reasonable discretion by the Court. Further Booker reinvigorated the Sixth Amendment right to a Jury trial, by prohibiting the trial court from relying on facts NOT decided by the Jury in enhancing a sentence beyond the statutory maximum, set by the legislature.

Although *Booker* did not involve "acquitted conduct," but only facts relied on by the sentencing court that were not determined by jury verdict, the majority in Faust, reasoned that the impact of *Booker* was limited to sentences imposed by the Court which exceeded the statutory maximum imposed by Congress, as was the case in *Booker* itself. However, the majority clearly recognized that the standard to be applied post-*Booker* was whether the sentencing Court was "reasonable" in considering facts not determined by Jury verdict.

Judge Barkett wrote specially in Faust, to point out that this reasoning did not track the main thrust of the Sixth Amendment analysis underlying the outcome in *Booker*. According to Judge Barkett:

> Although *United States v. Duncan*, 400 F3d 1297 (11th Cir), cert. denied, __U.S. 432, 126 S. Ct. 432, 163 L.Ed. 2d 329 (2005) expressly authorized the district court to enhance Faust's sentence for conduct of which

> a jury found him innocent, I strongly believe this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process clause of the Fifth Amendment. The Sixth Amendment right to a jury trial is endangered whenever a judge imposes a sentence that is not based solely on "facts reflected in the jury verdict or admitted by the defendant. Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 150 L.Ed2d 403 (2004). Faust at *5-6.

According to Judge Barkett, in light of the renewed importance with which the Court has treated Jury findings in the arc of cases from *Apprendi* to *Booker*, acquitted conduct that the Jury has affirmatively rejected MUST be treated much differently than conduct which has not been considered by the Jury. This led Judge Barkett to conclude that adherence to basic Sixth Amendment principles requires that "acquitted conduct" can *never* be considered by the sentencing Court ... IF the right to a Jury Trial is to retain its significance in our constitutional system.

It must be said that the differing views of the impact of *Booker*, beyond its facts, can only be ultimately resolved by further explication of the *Booker* doctrine by the Supreme Court itself. However, there can be no doubt that the reasoning of Judge Barkett is more fully supportive of the importance of the Jury as central to our system of justice, which was the apparent thrust of *Booker*. The importance of the Jury as a fact-finding entity within our system, in the view of the seven members of the Court who endorsed its reasoning in Booker, is of such a foundational importance that even Congressionally mandated Sentencing Guidelines cannot withstand its force.

According to Judge Barkett, any sentence based on

facts *rejected* by the Jury as acquitted conduct cannot properly be relied upon the sentencing court at all, if the Sixth Amendment right to a Jury Trial is to have real meaning. The instant case plainly demonstrates why the reasoning of the Judge Barkett must eventually be recognized as correct in light of the reasoning of *Booker*.

> The sentencing practice that Faust challenges does more than... undermine the particular significance that law and society attach to an acquittal. *See United States v. Francesco*, 449 U.S. 117, 129, 101 S. Ct. 426 66 L.Ed.2d 328 (1980). `When one looks to the practicalities of the criminal justice system,' it becomes apparent that the most pernicious effect of sentencing on the basis of acquitted conduct, and the one that most insidiously `violates the fundamental conceptions of justice which ... define the community's sense of fair play and decency,' *Dowling v. United States*, 493 U.S. 432, 110 S. Ct. 668, 107 L.Ed.2d 708 (1990), it its implicit and often hopeless demand that, in order to avoid punishment for charged conduct, criminal defendants must prove their innocence under two drastically different standards. *Faust* at *9.

Merely by imposing a sentence of 57 months, rather than 60 months and 1 day, which would have clearly violated *Booker*, the sentencing Court was able to put into the record ... and announce to the world, a string of vituperative allegations of violence, killing of women and children, and providing direct material support to forbidden organizations to justify *rejecting* the recommendation by the Department of Justice for a sentence at the bottom of the Guidelines, and the Justice Department's own description of the offense in question in the Plea Agreement, which also specifically rejected ALL of these allegations cited by the Court as having any validity at all. (*See* Plea Agreement, R. 1563,

Appendix 6).

In effect, by interpreting *Booker* as being limited to its facts, the sentencing Court was able to completely undermine the verdicts of acquittal and role of the Jury, itself, in finding facts upon which the Court may properly exercise its discretion. This attack on the Jury did not go unnoticed by members of the jury who were willing to comment publicly on the sentencing Court's reliance on facts that the Jury had rejected to vilify a defendant and to extend the incarceration of the acquitted Defendant by nearly a year beyond any sentence contemplated by the Department of Justice, itself.[4]

The clarity of the sentencing Court's attack on the Jury in this case is all the more egregious because the Court's recapitulation of rejected accusations was not supported by either information or recommendations on the Pre-sentence Report, prepared by the United States Probation Department, or the Plea Agreement, which also included a statement by the Department of Justice that the offence to which Dr. al-

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[4] See, Meg Laughlin, *In his Plea Deal, what did Sami Al-Arian Admit To?*, St. Petersburg Times, April 23, 2006. ("They have so little on him that I'm disappointed. Most of us think he gave in because he was so sick of being in jail," said juror Ron, who voted for acquittal.); Michael Fechter, Elaine Silvestrini and Lenny Savino, *No Guilty Verdicts in Al Arian Trial,* Tampa Tribune, December 7, 2005 ("One juror, who gave only her first name, said prosecutors failed to connect the dots on the conspiracies charged. Jurors were left to assume the defendants were aiding the Islamic Jihad even when the evidence didn't prove it, said Thanh, a 38-year-old department store sales associated from Lakeland... She offered money-laundering counts as an example: `They showed money moving to different accounts, but ... they didn't show it went to any terrorist organization.'").

Arian had pled guilty involved NO violence, NO victims, and NO support for a forbidden, "terrorist" organization. However, ALL of these un-founded allegations were broadcast world-wide ... because they had been uttered by a federal judge, even though at the moment they were uttered, the Court was aware that the record was completely devoid of any support for his condemnations in: (a) the Jury verdict; (b) the Plea Agreement; (c) the Pre-Sentence investigation; (d) testimony or admissions by the Defendant.

In practical effect, the sentencing Court converted *acquittal* by the Jury into a form of *public indictment*, to which the Defendant could not respond, which resulted in another year in prison and prevented the rapid deportation following the guilty plea, with which the Department of Justice had also agreed. There can hardly be a clearer example of a sentencing Court imposing its will, rather than the Jury's, on the outcome of a case.

In light of the political attention generated by Attorney General Ashcroft's press conference in Moscow and the high-profile given the case by the Administration, it is difficult to set aside the suspicion that the sentencing Court was playing to a political audience at the expense of the Jury in the case, and the Sixth Amendment more generally.

This Court should adopt the reasoning of Judge Barkett, and reject this attack on the principles underlying *Booker* that appears to be at the heart of the sentencing Court's actions in this case.

II. After *Booker*, a sentencing Court cannot "reasonably" rely on acquitted conduct, and/or unproved allegations of criminal conduct following a mistrial, when such conduct and allegations are not supported by the Pre-sentence Report or the terms of the Plea Agreement, itself,

in rejecting the sentence recommended by the Department of Justice.

Even if it were "reasonable" under *Booker*, for the sentencing Court to rely on acquitted conduct in sentencing a defendant, with which both Judge Burkett and Appellant do not agree, the question remains whether it is reasonable to do so when *both* the Probation Report and statement by the Justice Department in the Plea Agreement have ALSO rejected the substance of the conduct cited by the sentencing Court.

Without at least *some* factual basis upon which to reject the recommendation by the Justice Department from *some* source, other than the Court's own intuition, the exercise of discretion by the sentencing Court can hardly be considered "reasonable" by a reviewing Court, since the only basis for the exercise of this discretion announced by the Court had already been specifically rejected by BOTH parties. While a sentencing Court might find some basis in the background of a given defendant to reject the Justice Department sentencing recommendation, unproved or rejected allegations in an Indictment can hardly provide a *reasonable* basis for rejecting the carefully fashioned recommendation of the Department of Justice, whose familiarity with the facts of the case must exceed that of the Court, itself.

On these particular facts, *Booker's* reasonableness requirement has not been met due to the lack of any justifiable basis upon which to exercise the Court's discretion.

III. When the sentencing Court rejects the recommendation of the Justice Department by relying on such acquitted facts and unproven, unsupported allegations of alleged conduct, the Court creates the "appearance of bias" prohibited by the Supreme Court of

the United States in *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994), thus requiring resentencing and recusal of the sentencing Court.

It is well settled that actual bias, or the appearance of bias, is the basis for recusal within the federal system. See, 28 U.S.C. sec. 144 and sec. 455. In *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994), the Court held that "judicial remarks... [which] reveal such a high degree of favoritism or antagonism as to make a fair judgment impossible" are also the basis for recusal.

When, as occurred in this case, the sentencing Court makes a public statement justifying its rejection of the recommended sentence in the absence of any factual justification in the Pre-Sentence; the description of the offense by the Justice Department in the Plea Agreement, itself; AND states as fact, acquitted conduct as the basis for rejecting the Justice Department sentencing recommendation, this can only be characterized as the "high degree of...antagonism that makes a fair [sentence] impossible.

Moreover, like the accusation of "communist" at another period in our history, the unfounded public accusations by the Court verges on the "infamy" of an acquitted defendant in violation of the Fifth right to due process and the First Amendment right of freedom of association. *See*, *Ullman v. United States*, 350 U.S. 422, 76 S.Ct. 497 (1956) (Douglas, J.), *United States v. Scales*, 367 U.S. 203 (1961); *Bond v. Georgia*, 385 U.S. 116 (1966); *Indiana v. Whitcomb*, 414 U.S. 441, 94 S.Ct. 656 (1974).

IV. Due Process requires that sentencing, no less than the trial itself, requires an absence of actual bias and must prevent even the probability of unfairness, thus `justice must satisfy the appearance of justice' as required by the

Supreme Court of the United States in *Estes v. Texas*, 381 U.S. 532, 542-43, 85 S.Ct. 1628, 163-1633 and *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954).

Defendant Dr. al-Arian was sentenced in a proceeding that violated fundamental Due Process principles in which the "appearance of justice," a more fundamental concept than just apparent bias alone, which is the hallmark of a just proceeding, was overcome by the unsubstantiated public vilification of a defendant, based on conduct which had been affirmatively rejected by the Jury. As the Supreme Court noted in *Estes v. Texas,* 381 U.S. 532, 542-43, 85 S.Ct. 1628 (1995):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases, But our system of law has always endeavored to prevent even the probability of unfairness... **[T]o perform its high function in the best way `justice must satisfy the appearance of justice.'** *citing Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11 (1954) (emphasis added).

When, as occurred in this case, the sentencing Court not only rejects the sentence recommended by the Justice Department, but does so by making completely unsupported allegations of. (a) conduct that has been affirmatively rejected by the Jury; (b) conduct that is unsupported by an reference to the Pre-sentence Report; and (c) conduct that was affirmatively rejected by the Justice Department in its statement of the offense in the Plea Agreement in a case in which (d) the defendant did not testify regarding the events in question, the "appearance of justice" can hardly be found in the record.

Even if the sentencing Court did not suffer from *actual* bias, in the absence of *some* factual basis beyond the Indictment, which might be found in the Jury verdict; the Pre-

Sentence Report; the Plea Agreement, or even credibility issues arising from Defendant's testimony at trial, there is simply no factual basis in this case upon to find an "appearance of Justice" which comports with Due Process.

Furthermore, the Supreme Court has previously held that:

> Where the State attaches a `badge of infamy' to the citizen, due process comes into play. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 501, 510 (1971), *citing Wieman v. Updegraff*, 344 U.S. 183, 191, 73 S.Ct. 215, 218-219 (1952); *Joint Anti-Facist Refugee Committee v. McGrath,* 341 U. S. 123, 168, 71 S.Ct. 624, 646 (Frankfurter, J., concurring) ("[T]he right to be heard before being condemned to suffer grievous loss of any kind, though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.").

The *Constantineau* court went on to note, "where a person's good name, reputation, honor or integrity is at stake, because of what the government is doing to him, notice and opportunity to be heard are essential." *Id.* In the present case, Appellant did have an opportunity to be heard, in that he was able to present his case to a jury which, in large part, exonerated him. The Sentencing court, however, effectively mooted this hearing by disregarding its factual findings. In essence, Appellant has been put in the same situation as the infamed citizen from *Constantineau*. He has been stigmatized by the Government through a mechanism that violated his due process rights—the imposition of a sentence which is manifestly unreasonable under the *Booker* standard and which does not comport with traditional notions of fair play and equal justice.

V. Under *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663 (1978), *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971) and their progeny, effective plea bargaining is an essential element of the criminal justice system, which cannot survive rejection of Department of Justice recommended sentences, based on acquitted conduct after *Booker*, which is not otherwise supported in any submissions before the Court.

As this Court is well aware, the Supreme Court has recognized that an effective plea-bargaining system is essential to the function of the American legal system, and the federal courts in particular:

> The disposition of criminal charges by agreement between the prosecution and the accused ... is an essential component of the administration of justice.

Santobello v. New York, 404 U.S. 257, 260, 92 S.Ct. 495(1971), and had the Justice Department failed to make the agreed upon representations to the Court, even if the Court had not relied upon such recommendation, Dr. al-Arian would be absolutely entitled to at least a new sentencing procedure being imposed under the agreed upon conditions, before another sentencing judge would be required. *Santobello*, 404 U.S. at 263, 92 S.Ct. at 499.

In this case, the Justice Department scrupulously complied with the terms of the Plea Agreement, but the sentencing Court denied Dr. al-Arian the benefit of his bargain, just as surely as if the Justice Department, itself, had reneged on the proferred agreement. By relying upon acquitted conduct in rejecting the Justice Department's recommendation, without *any* other justification in the record for the Court's allegations of misconduct, or new circumstances unknown to the Justice Department at the time

the Plea Agreement was drafted and presented to the Court, the there is simply NO legitimate basis upon which to ground the Court's rejection of the Justice Department's recommendation.

Under Rule 11 of the Rules of Criminal Procedure, it goes without saying that the sentencing Court *has* discretion to reject the Plea Agreement reached with the prosecution, but that rejection must be based upon the record in some fashion, or the exercise of the Court's discretion can only be arbitrary and capricious. In this case, the sentencing Court apparently accepted the Agreement with respect to dismissal of the remaining Counts AND the sentencing *range* agreed to by the Parties.

However, by failing to accept the carefully crafted statement of facts, agreed to by the Justice Department, which included agreement that the offense to which the plea was entered involved: no violence, no victims and no direct support for a forbidden organization, as well as the recommendation of the Justice Department that a sentence at the "bottom" of the Guidelines would be appropriate, the Court actually accepted part of the Pleas Agreement, while simultaneously rejecting other portions, without any justification for doing so anywhere in the record. To the extent that the sentencing Court relied on: (a) acquitted conduct in violation of *Booker* and *Faust*; (b) conduct which is not mentioned either in the Pre-sentence Report or the Plea Agreement; or, (c) other allegations of misconduct which are unsupported by any factual basis in the record, the essence of the "bargain" was denied to the accused in violation of *Santobello* and re-sentencing before another judge, based solely on the record before the Court is necessary to ensure that sentences imposed in the federal courts are based on constitutionally appropriate facts. *United States v. Ledbetter,* 172 Fed. Appx. (11th Cir.) (2006).

Should this Court authorize the use of acquitted conduct, in the absence any other basis for rejecting the Justice Department's sentencing recommendation, the important objectives of plea bargaining recognized by the Supreme Court in *Bordenkircher v Hayes*, 434 U.S. 257, 98 S.Ct. 663 (1978) cannot be effectuated in practice. Not only does such a procedure violate the "community's sense of fair play," *Dowling v. United States*, 493 U.S. 342, 353, 110 S. Ct. 668 (1990), cited in Faust at *9. But, it makes plea "bargains" nothing of the sort, with sentencing decisions based merely on the whim the sentencing Court, unconnected to facts of the case, or the actual conduct of the accused. In this context, 57 month sentence which is unrelated to facts in the record, can hardly be more constitutionally acceptable that the 60-month-and-one-day sentence that *Booker* plainly would prohibit.

VI. A sentence imposed by the Court which is double that recommended by the Justice Department and based on acquitted conduct, which is not otherwise supported by facts in the record, raises a Presumption of Judicial Vindictiveness by apparently punishing the Defendant for having exercised the Sixth Amendment right to a Jury trial, under *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969), and its progeny.

It is well settled that Due Process is violated when, on retrial following appeal, the trial court imposes a higher sentence without some basis in fact, arising *after* the original sentence, because this sequence of events raises a "reasonable apprehension of actual vindictiveness" occasioned by a defendant exercising appeal rights. Of course, it is anathema to our system of justice to punish the exercise of rights guaranteed by that system, and a presumption of vindictiveness arises when this occurs post-trial. *United State v. Goodwin*, 457 U.S. at 381, 102 S.Ct. at 2492 (1982).

On the facts in this case, the sentencing Court relied almost exclusively on acquitted conduct, as well as: unproven conduct alleged to have been committed by co-defendants; conduct not mentioned anywhere in the Pre-sentence Report; or conduct mentioned the Justice Department's description of the offense in the Plea Agreement, to nearly double the sentence recommended *by* the Justice Department, after thorough evaluation and deliberation. It is impossible to ignore the plain implication that the Court imposed a sentence which punishes the defendant for having prevailed before the Jury. Without some significant factual basis set out in the record, by the Court, the only conclusion is that the presumption of vindictiveness has not been dispelled by reliance on new information, or facts not fully revealed to the Justice Department when the sentencing recommendation was put before the Court.

VII. The sentence imposed was unreasonable in light of the issues discussed above and in that it denigrates both the verdict and judgment of the jury and the evaluation and considered judgment of the Government of the United States.

Apart from other legal and constitutional error, the sentence imposed, which was twenty percent higher than the government recommendation upon the amicable resolution of this litigation, was unreasonable. Largely for the same reasons as the policies underlying the above-addressed legal arguments, the sentence imposed by the district court was unreasonable within the meaning of *Booker*.

Even under ordinary post-*Booker* reasonableness analysis, the 57- month sentence in this case would fail to meet the requisite standard, for much the same reasons as it fails to satisfy due process, respect the role of the jury, and

properly consider the broader interests sought by the government in this case. In the context of this case, the imposition of a sentence that is twenty percent higher than the sentence recommended by both the defense and the prosecution is presumptively unreasonable. It is the government that must pay for the incarceration of this defendant and account for the actions in this case as part of its overall strategies in such prosecutions. The defendants' lengthy punitive confinement was also given no account by the district court. The government's request for a recommendation of a sentence at the low end of the guideline range (46 months) was flatly rejected by the district court. The government's knowledge of its interests in this type of prosecution are of substantial importance and large deference. *See, Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

Nor did the district court's sentencing decision reflect the appropriate concern for the question of recidivism as to the offense of conviction. This was the defendant's first and only conviction. The government's recommendation thus was not an act of mercy, but a common-sense realistic evaluation of the needs of the public and the United States Justice Department, since upon information and belief, this Plea Agreement was approved at the highest levels of the Executive Branch, itself. The district court's decision to impose a sentence higher than the government's recommendation was not reasonable on this record.

CONCLUSION:

Appellant is NOT seeking withdraw his guilty plea. Rather he seeks *only* re-sentencing that reflects the agreement with the Justice Department, upon which the plea was premised, and that the case be remanded for re-sentencing before a Court whose impartiality is not reasonably subject to question.

Respectfully submitted,

dated: _____ _____

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Certificate of Compliance With Rule 32(a)

1. This brief complies with the type-volume limitations of Fed.R.App.P.32(a) (B) because this brief contains 6,636 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P.32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point Times New Roman font.

s/_____
Peter Erlinder, Counsel for Appellant

Dated: _____

UNITED STATES COURT OF APPEALS
FOR THE
ELEVENTH CIRCUIT

Case No. 06-12761-F

United States of America,

V.

Appeal from the United States District Court for the Middle District of Florida

Sami Amin al-Arian
Appellant,

AFFIDAVIT OF SERVICE

I, Peter Erlinder, affirm that two copies of two copies of appellant's brief were sent via United States mail to opposing counsel, Assistant U.S. Attorney Karin Hoppmann, at 400 N. Tampa St., Suite 3200, Tampa, FL 33602, on July 26, 2006.

Signed:

Prof. C. Peter Erlinder
Counsel for Appellant

_____ County

_____ State

Signed on the 26th day of July 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. APPEAL NO. 06-12761-FF

SAMI AMIN AL-ARIAN,
Defendant-Appellant.

UNITED STATES' MOTION FOR DISMISSAL OF APPEAL BASED UPON APPEAL WAIVER PROVISION IN PLEA, AND PURSUANT TO 11TH CIR.R. 42-4

Pursuant to Fed. R. App. P. 27 and 11th Cir. R. 27-1, as well as 11th Cir. R. 42-4 (providing for dismissal of frivolous appeals), the United States respectfully moves for dismissal of this appeal without further briefing or other proceedings. Al-Arian knowingly and voluntarily entered into a sentence appeal waiver as part of his written plea agreement that forecloses his ability to appeal on the grounds he now raises. In addition, Al-Arian's appeal is frivolous because his arguments are squarely foreclosed by this Court's binding precedent.

Pursuant to 11th Cir. R. 31-1(c), this Court should postpone further briefing until this Court has ruled on this motion to dismiss this appeal, as it is based in part on a sentence appeal waiver.

I. COURSE OF PRIOR PROCEEDINGS

In September 2004, a grand jury in the Middle District of Florida returned a superseding indictment charging Sarni Al-Arian with, among othr things, money laundering, material support for terrorism, and contributions to terrorist organizations. Doc. 636; see also Doc. 1057 (notice of summary of superseding indictment). A petit jury acquitted Al-Arian of several counts and hung on the remaining counts. Doc. 1463.

Al-Arian then entered a written plea agreement pursuant to which he agreed to plead guilty to conspiring to make and receive contributions of funds, goods, or services to or for the benefit of the Palestinian Islamic Jihad, a Specially Designated Terrorist organization, in violation of 18 U.S.C. § 371. Docs. 1563 (plea agreement); 1566 (acceptance of plea); 1561 (plea bearing transcript).[1]

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[1] A copy of the plea agreement is Attachment A; a copy of the

As part of the plea agreement, the parties agreed that "[p]ursuant to Fed. R. Crim. P. 11(c)(1)(C), ... the appropriate disposition of this case is a sentence within the guidelines range of 46-57 months." Doc. 1563 at 3. The parties further agreed that:

> Pursuant to Fed. R. Crim. P. 11(c)(1)(13), at the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United Sta es will recommend to the Court that the defendant receive a sent ce at the low end of the applicable guideline range, as calculated b the Court. The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

Id. at 5. The agreement also stated:

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plea hearing transcript is Attachment B. 2

> It is understood by the parties that the Court is neither a party to nor bound by this agreement..... The defendant understands and acknowledges that, although the parties are permitted to make recommendations and present arguments to the Court, the; sentence will be determined solely by the Court, with the assistance of the United States Probation Office.

Id. at 7.

Al-Arian agreed as part of the plea agreement "that [the district court] has jurisdiction and authority to impose any sentence up to the statutory maximum and "expressly waive[d]":

> the right to appeal [his] sentence or to challenge it collaterally on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment !to the Constitution; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by Title 18, United States Code, Section 3742(b), then the defendant is released from his waiver and may appeal the sentence as authorized by Title 18, United States Code, Section 3742(a).

Doc. 1563 at 7-8 (emphasis in plea agreement). At Al-Arian's plea hearing, the magistrate judge reviewed with Al-Arian his sentence appeal waiver:

THE COURT: ....Go to page 7, bottom of the page, Paragraph 5. ....This language is inserted in the plea agreement to cut down or limit or restrict your right to appeal in this case. This language basically says that there are three specific is ways by which you can initiate an appeal. The first way that you could initiate an appeal would be if your sentence was for more than what the law allows. I told you the maximum fine is $250,000. If you had had a $260,000 fine as part of your punishment, it's illegal because it's more than the law allows, and you could appeal it.

The second way that this language says that you could take an appeal would be if thee guidelines were calculated in a particular range and the judge went above that range. If Judge Moody–and I don't think you have to worry about this happening if this goes forward; but if Judge Moody were to bust the plea agreement and sentence you to, say, 60 months, that's above the guidelines calculation. That would be something that you could appeal.

And the third way you could take an appeal would be if something about the sentencing proceeding violated the Constitution.

Except in those three circumstances, however, this language is intended to *Ice away your right to appeal. If you read it

carefully, it says that the only other way you could appeal is if for some reason the Government appeals; and then if that happened, all bets are off, and you could appeal whatever you wish.

The effect of this is that on your sentencing day, when you appear, if the Judge sentences you within this calculated range that has been agreed to, you're going to be stuck with that sentence, meaning, you're not going to be able to appeal it, even if it's on the high end of that range, as long as it is lawful and constitutional. You understand that?

[AL-ARIAN]: I do.

Doc. 1561 at 28-30.

The district court ultimately sentenced Al-Arian to

fifty-seven months' imprisonment. Doc. 1574.

Al-Arian now appeals his sentence on various grounds, each of which is a variation of one or both of the following: (1) the district court erred under United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005), 14 considering at sentencing what Al-Arian claims was acquitted conduct (Al-Arian's Issues I-VII) and (2) the district court erred because it was bound to sentence ;Al-Arian in accordance with the United States' recommendation of a low-end guidelines sentence (Al-Arian's issues III-VII). See Al-Arian's brief at 1-2;[2] Al-Arian's brief at 8 ("The question before the Court is whether the sentencing Court may violate the spirit of Booker by rejecting the Justice Department's reco endation pursuant to a plea agreement to enhance a sentence within the maximum authorized by Congress by relying on facts rejected by the jury a acquitted conduct.").

H. MEMORANDUM OF LAW

This Court should dismiss this appeal because Al-

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[2] Al-Arian's Statement of Issues is included as Attachment C.

Arian knowingly and voluntarily waived his right to appeal his sentence on the grounds he raises in his opening brief. In any event, this Court should dismiss this appeal because the appeal is frivolous, as the grounds for relief Al-Arian raises in his brief are squarely foreclosed by binding precedent.

The right to appeal is a statutory right that can be waived if waived knowingly and voluntarily. United States v. Bushert, 997 F.2d 1343, 1350 (11th Cir. 1993); see United States v. Benitez-Zapata, 131 F.3d 1444, 1446 (11th Cir. 1997); United States v. Buchanan, 131 F.3d 1005, 1008 (11th Cir. 1997). For this Court to enforce a sentence appeal waiver, the United States need only demonstrate either (1) that the district court specifically questioned the defendant concerning the sentence appeal waiver during the Fed. IL Crim. P. 11 colloquy or (2) that it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver. Bushert, 997 F.2d at 1351. The critical inquiry is not the extent to which the district court reviewed the sentence appeal waiver but the extent to which the record demonstrates the defendant's knowledge and understanding of the waiver. See id. (the defendant's is knowledge and understanding of the waiver are among the components that constitute the core concerns of the defendant's right to be aware of the direct consequences of his guilty plea).

The district court specifically questioned Al-Arian concerning the sentence appeal waiver during the Rule 11 colloquy, and Al-Arian's response to the district court's inquiry demonstrates that Al-Arian understood the waiver. Doc. 84 at 13. Furthermore, in light of the lengthy history of this case and Al-Arian's direct involvement by representing himself, see Does. 182, 188, it is clear that Al-Arian had a great understanding of the legal issues in the case and the import of obligations like the sentence appeal waiver to which he agreed. Thus, the record demonstrates that the appeal

waiver is knowing and voluntary.

Al-Arian does not assert that his sentence exceeds the applicable guidelines range as calculated by the district court, exceeds the statutory maximum for his crime, or violates the Eighth Amendment. See Al-Arian's brief. Instead, he asserts that the district court erred by calculating his guidelines range based on acquitted conduct and that the district court erred by failing to sentence in accordance with the United States' recommendation of a particular sentence. Al-Arian's brief at 1-2, 8. Neither of these arguments falls within an exception to his sentence appeal waiver.

For this Court to entertain the issues that Al-Arian raises in his appeal would be to permit him an appeal in contravention of the plain *leaning of his plea agreement and to deny the United States the benefit for which it bargained. See Buchanan, 131 F.3d at 1008. Accordingly, dismissal or summary affirmance is warranted at the earliest stage in the process at which it is feasible. See id. ("where it is clear from the plea agreement and the Rule 11 colloquy . . . that the

defendant knowingly and voluntarily entered into a sentence appeal waiver, that waiver should be enforced without requiring the government to brief the merits of the appeal").

States' "recommend[ation] that a particular sentence" is appropriate pursuant to Fed. R. Crim. P. 11(c)(1)(B). United States233 F.3d 1308, 1320m (11th Cir. 2000). In the plea agreement in this case, the United States merely agreed "[p]ursuant to Fed. R. Crim. P. 11(c)(1)(B)" In addition, Al-Arian's appeal should be dismissed as frivolous because his arguments are squarely foreclosed by this Court's binding precedent. This Court specifically and repeatedly has held that, post-Booker, a district court may continue to consider acquitted conduct when calculating a defendant's guidelines range.[3] United States v. Faust, No. 05-11329, 2006 WL

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[3] The United States does not concede that the district court actually considered "acquitted conduct." See Doc. 1506 (United States' response to motions to dismiss based on "collateral estoppel").

2035467 at **4-5 (11th Cir. July 21, 2006); [4]United States v. Duncan, 400 F.3d 1297, 1304-05 (11th Cir,), cert. denied, 126 S. Ct. 432 (2005). This Court also specifically has held that the district court, while bound to sentence in accordance with the United States' "agree[ment] that a specific sentence" is appropriate pursuant to Fed. R. Crim. P. 11(c)(1)(C) (if the court accepts the plea agreement), is not bound by the United to " recommend" a sentence at the low end of the guidelines range, and the defendant acknowledged his "understand[ing] that this recommendation or request is not binding on the Court," and that "if not accepted by the Court, the defendant will not be: allowed to withdraw from the plea." Doc. 1563 at 5. Furthermore, the mag strate judge informed Al-Arian several times during his plea colloquy that th United States' recommendation was not binding on the district court and that court was free to sentence Al-Arian to as much as fifty-seven

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[4] Al-Arian relies heavily on the dissenting opinion in Faust to argue that the district court erred by considering acquitted conduct at sentencing. Al-Arian's brief at 10-17.

months' impriso ent. Doc. 1561 at 21[5]; see also id. at 17

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[5] [I]n matters such as . . . the low-end disposition recommendation, these are, in effect, nothing more than recommendations to Judge Moody as to what he should do at your sentencing, and you need to be very clear that they're not binding recommendations. It is entirely possible–entirely possible that he may consider these representations but choose to do something different. . . .

And, in particular, with regard to the low-end disposition provision at page 5, he may not give you the benefit of that recommendation. He might see something in the presentence report. He might hear something at sentencing. He might recall something from the trial. There might be any number of factors that could come into play that would prompt him to determine that it is not appropriate to give you the benefit of that provision; and, if so, you will not get the benefit of that provision.

Doc. 1561 at 20-22.

(magistrate explains that the plea agree ent is not binding on the court except to the extent stated), 23. Thus, the district c urt certainly was not bound by the United States' recommendation as Al-Arian contends.

Moreover, on appeal, Al-Arian explicitly foregoes the only remedy to which he would be entitled had the district court been bound by the United States' recommendation: withdrawal of his plea. See Al-Arian's brief at 28 ("Appellant is NOT seeking [to] withdraw his guilty plea. Rather, he seeks only re-sentencing that reflects the agreement with the Justice Department, upon which the plea was premised, and that the case be remanded for re-sentencing before a Court whose impartiality is not reasonably subject to question." (emphasis Al-Arian's)). Thus, even if this Court somehow were to find that the district court erred, Al-Arian would receive no relief. See Santobello v. New York, 404 U.S. 257, 261-62, 92 S. Ct. 495, 498-99 (1971) (proper remedy for a breach of plea agreement is withdrawal of plea unless defendant already has relied upon agreement, in which case specific performance is appropriate); United States v. Zickert, 955 F.2d 665, 668 (11th Cir. 1992) (when court failed to inform defendant that, should the court impose a sentence different from that agreed to as binding by United States, remedy was withdrawal of plea).

CONCLUSION

THEREFORE, this Court should dismiss Al-Arian's appeal without further proceedings.

Respectfully submitted,

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DATE: August 18, 2006

United States v. Sami Amin Al-Arian

Appeal No. 06-12761-FF

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following persons and entries have an interest in the outcome of this case:

1. Sarni Amin Al-Arian, defendant/appellant;

2. Jeffrey G. Brown, district court counsel for Al- Arun;

3. Alexis L. Collins, Assistant United States Attorney, district court counsel for the United States;

4. Daniel W. Eckhart, Assistant United States Attorney, district court counsel for the United States;

5. Prof. C. Peter Erlinder, appellate counsel for an;

6. Walter E. Furr, Assistant United States Attorney, district court counsel for the United States;

7. Karin B. Hoppmann, Assistant United States Attorney, primary appellate counsel for the United States;

8. Cherie L. Kringsman, Assistant United States Attorney, district court counsel for the United States;

9. Franklin Louderback, district court counsel for Al-Arian;

10. Nicholas M. Matassini, district court counsel for Al-Arian;

11. William B. Moffitt, district court counsel for Al-Arian;

12. Honorable James J. Moody, United States District Court Judge;

13. Linda G. Moreno, district court counsel for Al-Arian;

14. Paul I. Perez, United States Attorney, counsel for the United States;

15. Tamra Phipps, Assistant United States Attorney,

Chief, Appellate Division, appellate counsel for the United States; and

16. Terry Zitek, Executive Assistant United States Attorney, district court counsel for the United States.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent on this the 18th day of August, 2006, via the United States Postal Service, to the following:

Prof. Peter Erlinder
Wm. Mitchell College of Law
875 Summit Av.
St. Paul, MN 55105
COUNSEL for Al-Arian

_____
KARIN B. HOPPMANN
Assistant United States Attorney

IN THE UNTIED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA
Plantiff-appellee,

v. APPEAL No. 06-12761-FF

SAMI AL-ARIAN
Defendant-appellant,

Memorandum in Opposition to Motion to Dismiss

A "knowing and intelligent waiver," long required under Johnson v. Zerbst, 304 U.S. 458 (1938), is implicit in any plea agreement waiving appeal and accepting of the power of the court to differ with the recommendation of the Justice department. However, any such waiver can reasonably extend *only* to the exercise of judicial discretion within proper constitutional limits, should the court elect to reject the recommendations of the Justice Department.

In this case, the issues raised on appeal were not, and could not have been, waived prior to the sentencing hearing because the alleged abuse of discretion did not arise until *after* the Plea Agreement and waiver had occurred. When a trial court has exceeded the limits of its sentencing authority, it is well-settled that prior waivers are ineffective and the remedy of specific performance is appropriate, in this Circuit and elsewhere. See, Santobello v. New York, 404 U.S. 257, 261-262 (1971) and United States v. Zickert, 955 F.2d 665, 668 (11th Cir 1992).

Withdrawal of a guilty plea, following improper exercise of judicial discretion, is NOT the only

remedy available in this Circuit, as asserted by Appellee [Motion p. 11], and is not an issue in this case. Defendant receiving the "benefit of his bargain," which includes: (a) a constitutionally valid sentencing hearing and (b) the exercise of judicial discretion within constitutional limits, certainly is an issue that this Court can, and must, decide on the merits.

With respect to the proper exercise of judicial discretion in sentencing, after United States v. Booker, 543 U.S. 220 (2005) which clearly circumscribes judicial discretion in relying on facts not found by the jury, a "knowing and intelligent waiver" of appeal rights cannot include waiver of the right to have a sentence imposed *within* the judicial discretion permitted *by* Booker. Certainly, after Booker, a general appeal waiver cannot reasonably foreclose appeal of a sentence which plainly violates the specific facts of Booker, without *at* least a specific waiver of the right to be sentenced pursuant to Booker in the record and, perhaps, not even then. This question has not been resolved by this Circuit, or by the Supreme Court after Booker.

One of the questions before this Court is whether the principles underlying Booker, as described in the concurring opinion of Judge Barkett in United States v. Faust, No. 05-11329, 2006 WL 2035467 (July 21, 2006) can be waived, without, at least, the express agreement of the defendant. Whether "acquitted conduct" may ever properly provide the basis for the exercise of judicial discretion in sentencing was not resolved in Booker, and has not been finally resolved in this Circuit, as the Faust concurring opinion demonstrates.

Moreover, because the trial court could not cite one fact upon which to reject the Justice Department recommendation that was: (a) found by a jury under Booker OR to be found in (b) the Pre-sentence Report OR (c) the Plea

Agreement, which was NOT considered by the Justice Department when it agreed to forego further prosecution of the counts in the Indictment, there is simply no factual basis upon which to support the trial court's refusal to accept the Justice Department's recommendation. Rather, as the Appellant's Brief details, the soliloquy of the trial court at sentencing [Appellant's Appendix, item 4] revealed that the court abused it discretion by rejecting the Justice Department's thoroughly and carefully developed recommendation in a manner that violated several foundational constitutional limitations upon judicial discretion, in addition to Judge Barkett's analysis of the impact of Booker on judicial reliance on "acquitted conduct" in sentencing.

By the very act of: (a) relying on numerous, specific acts acquitted conduct; (b) reading an apparently prepared statement that included allegations of conduct, such as the "Great Satan" comment, which was actually alleged to have been that of a co-defendant; and, (c) by failing to cite a single fact upon which to base its exercise of discretion in rejecting the Justice Department recommendation, the sentencing hearing, itself, gave rise to numerous constitutional violations, in addition to the Booker issue, which were not, and could not have been, waived under the requirements of Johnson v. Zerbst, prior to the hearing on May 1, 2006.

To wit:

Defendant's acceptance of judicial power to exercise constitutionally appropriate discretion in sentencing, and waiver of appeal rights were not, and could not be, a "knowing and intelligent" waiver the right to a sentencing procedure free from the "appearance of bias" prohibited by the Supreme Court in Litecky v. United States, 510 U.S. 540, 555 (1994).

Defendant's acceptance of judicial power to exercise constitutionally appropriate discretion in sentencing and waiver of appeal rights were not, and could not be, a "knowing and intelligent" waiver his due process right a sentencing procedure which "...satisfy[ies] the appearance of Justice." required by the Supreme Court in Estes v. Texas, 391 U.S. 532, 542-43 and Offut v. United States, 348 U.S. 11, 14 (1954) to justice"

Defendant's acceptance of judicial power to exercise constitutionally appropriate discretion in sentencing and waiver of appeal rights were not, and could not be, a "knowing and intelligent" waiver his right to challenge the post-trial "presumption of judicial vindictiveness," which arises whenever a trial court exercises its discretion to increase penalties without a factual basis, following a defendant's exercise of his right to a jury trial, which was prohibited by the Supreme Court in North Carolina v. Pearce, 395 U.S. 711 (1969).

Should this Court grant Appellee's Motion to Dismiss on *these* facts, "waiver of appeal rights" in plea agreements, as interpreted by this Circuit, will effectively insulate a// excesses of judicial discretion in sentencing from appellate review not just excesses of judicial discretion prohibited by Booker. This result cannot be in the long-term interests of the Justice Department, much less this Court, irrespective of the interests of the Defendant in this particular case.

However, in this case it would be particularly egregious. This defendant has been *acquitted* of the charges involving violence or support for terrorism, or the jury was deadlocked for acquittal by a margin of 10-2. A jury has NOT found one single fact upon which the court could impose a sentence of any kind, in the absence of the Plea Agreement. Moreover, the Plea Agreement submitted to the trial court by

the Justice Department *specifically* stated that: there was no violence associated with the plea; there were no human victims associated with the plea; that there was no directed support for a "terrorist designated organization" associated with the Plea Agreement [Motion, Attachment A]. *All* of which were asserted by the trial court as reasons for rejecting the recommendation of the Justice Department. [Appellant's Appendix 4].

Furthermore, the defendant's rapid deportation from the United States was required by the Justice Department and agreed to by the Defendant, and is the subject of an Order for Removal entered by the trial court on May 1, 2006. [Appellant's Apprendix, item 3]. By rejecting the Justice Department recommendation, in this case, the trial court has delayed the departure of the defendant from the United States, which deprives BOTH Appellant and Appellee from the benefit of the bargain each had struck to put an end to the Al-Arian saga in Tampa. [Appellant's Appendix, item 6, Plea Agreement, No. 8].

Since it is undisputed that Defendant is a Palestinian, and does not *have* a passport [See Appellant's AppendixPre-sentence Report], the extended prison sentence imposed by the trial court has created the possibility, if not the likelihood, that the temporary travel documents which would have been valid at the time of his release as agreed by the Justice Department agreement, will not be available in April of 2007. Had it not been in the interest of the United States for the defendant to leave the country as soon as possible, presumably the Justice Department would not have made in a condition of the guilty plea.

Further, at the time of his release in 2007, it is not possible to predict whether deportation will be able to be arranged at that time. This means that indefinite deportation

detention, which would not have been the case pursuant to the Plea Agreement, is likely unless travel documents can be secured at that time. Thus, the unsupportable use of acquitted conduct, presumably vindictive motive and unconstitutional exercise of judicial discretion by the trial court in this case...during the sentencing hearing, has deprived BOTH parties of the "benefit" of their bargain."

Were these facts to come to represent the standard of judicial sentencing discretion to be upheld in this Circuit, the plea "bargaining" system, which the Supreme Court has recognized in Bordenkircher v. Haves, 434 U.S. 357 (1978) is necessary to the functioning of the criminal justice, itself, will cease to function predictably for any of the parties at interest, including this Court.

WHEREFORE, counsel for defendant-appellant respectfully prays that this Honorable Court deny Appellee's Motion to Dismiss, and to set a briefing schedule of the substantive issues raised in Appellant's Brief, consistent therewith.

Respectfully submitted,

dated: Aug. 26, 2006

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St. Paul, MN 55105
(6512) 290-6384

United States v. Sami Amin Al-Arian

Appeal No. 06-12761-FF

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Sami Amin Al-Arian, defendant/appellant;

2. Jeffrey G. Brown, district court counsel for Al-Arian;

3. Alexis L. Collins, Assistant United States Attorney, district court counsel for the United States;
4. Daniel W. Eckhart, Assistant United States Attorney, district court counsel for the United States;
5. Prof. C. Peter Erlinder, appellate counsel for Al-Arian;
6. Walter E. Furr, Assistant United States Attorney, district court counsel for the United States;

7. Karin B. Hoppmann, Assistant United States Attorney, primary appellate counsel for the United States;

8. Cherie L. Kringsman, Assistant United States Attorney, district court counsel for the United States;

9. Franklin Louderback, district court counsel for Al-Arian;

10. Nicholas M. Matassini, district court counsel for Al-Arian;

11. William B. Moffitt, district court counsel for Al-Arian;

12. Honorable James J. Moody, United States District Court Judge;

13. Linda G. Moreno, district court counsel for Al-Arian;

14. Paul I. Perez, United States Attorney, counsel for the United States;

15. Tamra Phipps, Assistant United States Attorney, Chief, Appellate Division, appellate counsel for the United States; and

16. Terry Zitek, Executive Assistant United States Attorney, district court counsel for the United States.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Appellee's Motion to Dismiss pursuant to Rule 27 of the F.R.A.P. was received, via the United States Postal on Monday, August 21, 2006, and a copy of the foregoing responsive Memorandum was sent this day,

__Aug 28th__ 2006, to the following:

AUSA Karen B. Hoppmann
Appellate Division
400 N. Tampa St. Ste 3200
Tampa, Fla. 33602

s/_____
Peter Erlinder
Counsel for Defendant-Appellant

United States Court of Appeals
For the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

For rules and forms visit
www.call.uscourts.gov

October 05, 2006

Sheryl L. Loesch
Clerk, U.S. District Court
801 N FLORIDA AVE RM 220
TAMPA FL 33602-3849

Appeal Number: 06-12761-FF
Case Style: USA v. Sami Amin Al-Arian
District Court Number: 03-00077 CR-T-30-TBM

The enclosed certified copy of this Court's Order of Dismissal is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

The district court clerk is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Marcus Simmons
(404) 335-6175

Encl.

IN THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 06-12761-FF

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SAMI AMIN AL-ARIAN,
a.k.a. Amin,
a.k.a. Abu Abdullah,
a.k.a. The Secretary,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

BEFORE: CARNES, BARKETT and PRYOR, Circuit Judges
BY THE COURT:

Appellee's motion to dismiss this appeal due to a valid appeal waiver contained in Appellant's plea agreement is GRANTED as the issues raised by Appellant in this appeal do not fall into the exceptions to the appeal waiver and the record establishes that the appeal waiver was knowing and voluntary. See U.S. v. Benitez-Zapata, 131 F.3d 1444, 1446 (11th Cir. 1997); U.S. v. Bushert, 997 F.2d 1343, 1350 (11th Cir. 1993).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)
Plaintiff-Appellee,	)
v.	) Appeal No. 06-12761
Dr. Sami AL-ARIAN,	)
Defendant-Appellant,	)

MOTION TO VACATE THE ORDER OF OCTOBER 5, 2006: PURSUANT TO THE APRIL 14, 2006 "CHANGE OF PLEA" COLLOQUY BEFORE MAGISTRATE JUDGE McCOUN AND U.S. v. BUSHERT, THE BINDING PRECEDENT IN THIS CIRCUIT

Pursuant to 11th Cir. R. 27-2, Appellant moves this Honorable Court for an ORDER: vacating the Order of October 5, 2006; reinstating this appeal; and, setting an expedited Briefing Schedule under Rule _____.

1. RECORD OF PROCEEDINGS OMITTED FROM THE GOVERNMENT'S MOTION TO DISMISS

> THE COURT: I don't think you have to worry about Judge Moody holding any matters for which you were acquitted against you at all....! don't think on any counts you've been acquitted of you can –you should worry about the judge holding it against you...
>
> What I – I'm simply pointing out here, so people don't get blind sided as they move towards sentencing... in this case the Court has agreed to the larger ones with regard to incarceration.... You understand?

THE DEFENDANT: Yes sir.

Doc. 1561 at 28-29. (Rule 11 hearing on April 14, 1948 before Magistrate Judge McCoun) (emphasis added).

2. MEMORANDUM OF LAW

It has long been established in this Circuit that oral pronouncements by the Court, particularly the colloquy at the Rule 11 change of plea hearing, rather than the bare language of the written agreement itself, must be the record upon which the question of waiver is determined, "an oral pronouncement... control(s) over a conflicting written judgment, even if the oral statement is mistaken, " see, U.S. v. Khoury, 901 F.2d 975, 977-78 (11th Cir. 1990).

Of course, the record of the May 1, 2006 sentencing hearing demonstrates that Judge Moody DID hold acquitted conduct against the Defendant, to justify extending his incarceration for nearly a year beyond that recommended by the Government which, in effect, voided the "expedited deportation" which the Government agreed was in the best interest of justice, and the Government of the United States. Contrary to the plea hearing colloquy, the Defendant and Counsel WERE "blind sided" by an improper exercise of judicial discretion, unsupported by the Rule 11 colloquy, which was not reasonable under U.S. v. Booker, on these facts.

Moreover, as the Government makes clear on Page 4 of its Motion to Dismiss, there is no dispute that the "plea colloquy" of April 14, 2006 before Magistrate Judge McCoun also included the specific admonition by the Court that there are three bases upon which Appellant may properly appeal the sentence:

> COURT: "...This language [in the written Plea Agreement] basically says that there are three specific ways by which you can initiate an appeal. The first way that you could initiate an appeal would be **if your sentence was for more than what the law allows....**
>
> The second way that his language [in the written Plea Agreement] says that you could take an appeal would be if the guidelines were calculated in a particular range and the judge went above that range....
>
> And the third way you could take an appeal would be **if something about the sentencing violated the Constitution...**
>
> The effect of this is that...you are not going to able to appeal [the sentence], **as long as it is lawful and constitutional..."**

Doc. 1561 at 28-30, cited in Government's Motion pp 4-5, (emphasis added).

This Court may not have noticed that the Government's Motion to Dismiss failed to highlight the specific portions of the April 14, 2006 Rule 11 colloquy in which Magistrate Judge McCoun specifically discussed the expected impact of acquitted conduct on the Defendant's sentence (i.e. NONE). The Government's Motion also failed to emphasize the exclusion of claims of unlawful and unconstitutional conduct from the appeal waiver, which is binding on this Court under U.S. v. Khoury, 901 F.2d 975, 977-78 (11th Cir. 1990).

As this Court is aware, the Brief of Appellant raises ONLY those issues specifically described by the Magistrate Judge, as being excluded from the waiver:

(a) Constitutional Due Process questions arising from the record of the sentencing hearing before the District Court in which allegedly unlawful or unconstitutional vindictive motive, or the appearance thereof;

(b) Constitutional Due Process and Sixth Amendment questions regarding the imposition of a sentence by Judge Moody, specifically relying upon acquitted conduct, which is both allegedly unlawful and unconstitutional, under the reasoning of the Supreme Court in United States v. Booker, 543 U.S. 220 (2005), as elaborated by Judge Barkett in dissent in U.S. v. Faust, 2006 WL 2035467 (11th Cir. July 21, 2006).

(c) Constitutional Due Process and violations of law by the Court, under U.S. v. Bushert, 997 F.2d 1343 (11th Cir. 1993) and U.S. v. Khoury, 901 F.2d 975, 977-78 (11th Cir. 1990), in relying on factors specifically excluded from consideration in sentencing in the plea colloquy before the Magistrate Judge.

In its Order of October 5, 2006, the panel of this Circuit held that "the issues raised by Appellant in this appeal do not fall into the exceptions to the appeal waiver and that the appeal was knowing and voluntary." The panel relied upon two pre-Booker "waiver" cases, U.S. v. Bushert, 997 F.2d 1343, 1350 (11th Cir. 1993) and U.S. v. Benitez-Zapata, 131 F.3d 1444, 1446 (11th Cir. 1997) for support. However, the facts of *both* of these cases, and other precedent from this Circuit and elsewhere actually *support* Appellant's position that, as a matter of law: (a) the written Plea Agreement; (b) the Pre-Sentence Investigation; (c) the April 14, 2006 hearing before Magistrate Judge McCoun; and, (d) the May 1, 2006 hearing before Judge Moody, clearly establish that any waiver of appeal in this case did not, and could not, apply to *unlawful*

or *constitutional* rulings or conduct by the District Court following the plea, much less the use of *acquitted* conduct to extend the sentence beyond that recommended by the Government.

In the case before the Court, the colloquy at the April 14 plea hearing is even more supportive of the retention of the Appellant's right to pursue an appeal of an unlawful or unconstitutional sentence than that in U.S. v. Bushert, much less U.S. v. Benitez-Zapata. In this case, the Court *specifically* assured the Defendant that Judge Moody would NOT consider acquitted conduct, even if the Government might use it in argument, (which he did) AND *specified* that the right to appeal a sentence that was not "lawful or constitutional" was NOT being waived through the plea agreement. The written waiver in Bushert included *only* the following:

> "[d]efendant knowingly and voluntarily agrees to waive his right to appeal or contest, directly or collaterally, his sentence on any ground, unless the Court should impose a sentence in excess of the statutory maximum *or otherwise impose a sentence in violation of law* apart from the sentencing guidelines." Bushert at 1345 (emphasis added).

During the Rule 11 plea colloquy in Bushert, the Court established that the plea was voluntary and that the Defendant understood he was giving up the right to a jury trial and the right against self-incrimination. However, the Court also stated the following:

> THE COURT: Do you also understand that under some circumstances you or the government may have the right to appeal any sentence that the Court imposes, do you understand that?

THE DEFENDANT: Yes, Your Honor.

Bushert at Id.

On appeal in Bushert, as in this case, the Government argued that the Defendant's written waiver served as a complete bar to an appeal of his sentence. This Court flatly rejected this proposition relying, at least in part, on the provisions of Sentencing Reform Act, 18 U.S.C. 3551 *et seq,* and particularly on 18 U.S.C. 3742(a) which permitted appeal of sentences "*imposed in violation of law*....[and those] imposed as a result of an incorrect application of the sentencing guidelines." Bushert at 1350, (emphasis added).

In this case, the colloquy in the April 14, 2006 plea hearing before Magistrate Judge McCoun was far more explicit regarding the retention of appeal rights regarding unlawful or unconstitutional conduct or rulings during sentencing, guidelines issues aside. Moreover, the Magistrate Judge specifically assured the Defendant and Counsel that Judge Moody would NOT do exactly what Judge Moody DID do, in the exercise of his discretion in sentencing, that is basing his exercise of discretion on acquitted conduct.

In U.S. v. Benitez-Zapata, another pre-Booker case cited in the ORDER, the defendant agreed to the following, in the written Plea Agreement:

> [T]he defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the maximum set forth for the offense and pursuant to the sentencing guidelines, and expressly waives the right to appeal defendant's sentence, directly or collaterally, on any ground except for [1] an upward departure by the sentencing judge; [2] a sentence above the statutory maximum or [3] a sentence in violation of the law apart

from the sentencing guidelines. Benitez-Zapata at 1445.

The defendant and counsel also agreed that determination of whether "substantial assistance" rests solely with the government, and that this determination was not subject to challenge by the defense.

However, unlike the case before this Court, the District Court inquired in detail, and on the record, whether the defendant understood the effect of the waiver and the maximum penalties for the crime to which he had pled guilty:

> COURT: Now, I understand that there is a Plea Agreement...and that you give up your right to appeal the sentence...except for a sentence that exceeds the maximum sentence or an upward departure from the sentencing guidelines. Is that your understanding of your Plea Agreement?
>
> DEFENDANT: Yes.
>
> COURT: Do you understand the defenses and the rights of appeal that you waive or give up in this case?
>
> DEFENDANT: Yes.
>
> COURT: Have you had enough time to talk to your lawyer about this?
>
> DEFENDANT: Yes...
>
> COURT: And, do you feel that you fully understand all the rights and the procedures that you waive and give up while pleading guilty to the charge?
>
> DEFENDANT: Yes.

Some months later, at the sentencing hearing, the district court granted only a 2-level reduction, rather than the 4-level reduction requested by the defendant, based on the finding that he was a "minor" rather than a "minimal" participant and the Government declined to make a motion for a downward departure. The district court then stated:

> "you are hereby advised that it is your right to appeal the judgment and sentence within ten days from this date." Benitez at 1445-46.

The defendant in Benitez appealed both the district court's finding and the refusal of the government to seek a downward departure. The Government contended that appeal of both of these issues was waived under the two-part test set out in U.S. v. Bushert, 997 F.2d 1343, 1352 (11th Cir. 1993), which requires the government to demonstrate either: (1) the district court specifically questioned the defendant about the terms of the waiver in the plea colloquy, or (2) the record shows that the defendant otherwise understood the full significance of the waiver.

In Benitez, the Court rejected the argument that the district court's oral statement at sentencing regarding "the right to appeal the judgment and sentence within 10 days" (which was apparently similar to the ambiguous remarks that caused this Court to find the putative waiver not to be valid in Bushert did NOT invalidate the waiver, as it did in Bushert. The distinction, according to the Court was that: (a) the remark was made following the specific oral questions regarding the defendant's understanding of the waiver; (b) the remark was made in closing of the sentencing hearing... not during the plea hearing, as occurred in Bushert, and that the waiver issue had been thoroughly discussed in the hearing. Benitiz at 1446-47.

However, in the case before this Court, the colloquy at the April 14 plea hearing before Judge McCoun *specifically* excluded waiver of the right appeal with respect to unlawful or otherwise unconstitutional acts by the district court *or* prosecution, following the entry of the plea. Moreover, the colloquy specifically stated that *acquitted* conduct would not have any bearing on the sentence imposed by Judge Moody. (Doc. 151 at 27-30, April 14, 2006 Rule 11 hearing). In this case, the Judge Moody's ambiguous statements at sentencing, and the failure of Judge Moody to make any specific inquiries at sentencing regarding the Defendant's understanding of the scope of the waiver, occurs in a context in which the magistrate judge made "oral pronouncements must prevail, even if... mistaken." Khoury at 977-78.

However, in Benitez, it was apparent from the plea colloquy above that the district court DID specifically question the defendant about the terms of the waiver and did NOT specifically delineate the exceptions as did Magistrate

Judge McCoun in this case, Benitez at 1445-46, and certainly did not assure the Defendant, as occurred in this case, that the specific issue which was the subject of the appeal (i.e. *acquitted conduct* in this case) would NOT be considered by the District Court.[1]

In the May 1, 2006 sentencing colloquy in this case, Judge Moody made NO specific reference to the defendant's understanding of any of the terms of the Plea Agreement, and provided no notice that the Court would fail to follow the

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[1] Other cases cited by the Government also are inapposite in that the change-of-plea colloquy upon which the appeals were based did not include a specific reference to either assurances that acquitted conduct would not be considered by the District Court, nor did any include specific exclusion of unlawful or constitutional post-plea conduct, as occurred in this case. See, U.S. v. Camacho, 233 F.3d 1308 (11th Cir. 2000) and U.S. v. Buchanan, 131 F.3d 1005 (11th Cir. 1997). See also, U.S. v. Grinard-Henry, 399 F.3d 1294 (11th Cir. 2005) and U.S. v. Bascomb, 451 F.3d 1292 (11th Cir. 2006)

representations in the colloquy with the Magistrate Judge on April 14, 2006:

> COURT: To the extent permitted by your plea agreement, you have the right of appeal from the judgment and sentence within ten days from this date. Failure to appeal within the ten-day period shall be a waiver of your right to appeal. The government also has a right to appeal from this sentence.

(May 1, 2006 Trans. pp. 19-20).[2]

On these facts, unlike the plea colloquy in Benitez, it is plain that the first prong of the Bushert test for waiver has not been met, as a *matter of law*. Moreover, assuming that

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[2] Nor did Judge Moody instruct Defendant Dr. Al-Arian that he could withdraw his plea, once Judge Moody had imposed a sentence which was completely contrary to Magistrate Judge McCoun's assurance that acquitted conduct would NOT be considered by Judge Moody.

Appellant was only alleging a Rule 11 violation (which would also be excluded from the waiver, as articulated by Magistrate Judge McCoun), rather than violations if Due Process and the Sixth Amendment, the failure of the District Court is plain error under U.S. v. Camacho, 233 F.3d 1308, 1313 (11th Cir. 2000); U.S. v. Romano, 314 F.3d 1279, 1281 (11th Cir. 2002); U.S. v. Rodriguez, 398 F.3d 1291, 1299-1301 (11th Cir. 2005); and U.S. v. Wright, 154 Fed. Appx. 790 (11th Cir. 2005).

CONCLUSION

WHEREFORE, Appellant Dr. Sami al-Arian, by and through Counsel, respectfully requests this Court for an ORDER: vacating its Order of October 5, 2006; reinstating the above appeal; and, setting an expedited briefing schedule, or such other relief as deemed appropriate by this Court.

Respectfully submitted:

_____ DATE: October ____ , 2006

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12761-FFF

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SAMI AMIN AL-ARIAN,
a.k.a. Amin,
a.k.a. Abu Abdullah,
a.k.a. The Secretary,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: CARNES, BARKETT and PRYOR, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of this Court's October 5, 2006, Order dismissing this appeal due to a valid appeal waiver in Appellant's plea agreement is DENIED.